

## DECLARATION OF LAWRENCE FERRARA, Ph.D.

I, Lawrence Ferrara, declare as follows:

1. I am a musicologist and on the full-time faculty at New York University where my rank is Professor of Music, and my title is Director Emeritus of all studies (B.M. through Ph.D.) in Music and the Performing Arts in NYU's Steinhardt School. I have written and co-written published books and articles (in peer reviewed journals) regarding music analysis, methodologies in music research, and other scholarly areas related to music. I currently sit on editorial boards of peer-reviewed scholarly journals in music including journals published by Indiana University Press and University of Illinois Press. I have been an active music copyright consultant for record, music publishing and motion picture companies, and individuals in the United States and abroad for more than 25 years. I have given invited lectures on music copyright at Harvard University Law School in each of the last twelve years, and presentations at Columbia University Law School over the last fifteen years. I have also presented several peer-reviewed papers regarding music copyright at meetings of the American Musicological Society GNY, and panel presentations for numerous organizations such as The Copyright Society of the United States. My *curriculum vitae* was attached as Appendix 1 to my Rebuttal Report dated September 29, 2021, hereafter "the Ferrara Rebuttal Report", which report is attached hereto (including exhibits).

2. Herein, I respond to the musicological portions of Defendants' Motion For Summary Judgment, namely: (1) pages 14-22 therein, (2) the Declaration of Leonard Duboff, and (3) the Declaration of Judith Finell.

### **PAGES 14-22 OF DEFENDANTS' MSJ**

3. At page 14 of their MSJ, Defendants write:

"The gist of Ambrosetti's theory of unlawful appropriation is that the two works share a sequence of eight pitches in their first musical phrases, a sequence of five pitches in their second musical phrases, and a sequence

of five pitches in their third musical phrases, and that this combination suggests copying.”

Defendants’ “gist” summary is misleading and wrong. The Ferrara Rebuttal Report shows that 21 out of a total of 26 notes (80.7%) in the corresponding melodies in bars 1-12 of the Verses in “Emmanuel” and “Christ Be Our Light” (hereafter “Christ”) share the same pitches and scale degrees, and 13 of those 21 shared pitches also have the same rhythmic durations. This musicological fact is demonstrated in Rebuttal Report Musical Example 1 at page 9 of the Ferrara Rebuttal Report, which uses the notes and scale degrees from Musical Example 2 of the report dated July 27, 2021 by Judith Finell (hereafter, “the Initial Finell Report”). That musical example is copied immediately below.

### REBUTTAL REPORT MUSICAL EXAMPLE 1

As transcribed in Musical Example 2 of the (Initial) Finell Report

Bars 1-12 of the Verse in “Emmanuel” and “Christ”

**Red** highlighted note heads are added to facilitate the comparison

The image displays two musical staves, one for "Emmanuel" and one for "Christ", both in 3/4 time. The notes are transcribed with scale degrees (1-7) above them. Red note heads are used to highlight specific notes in both staves to facilitate comparison. The "Emmanuel" staff shows notes with scale degrees 5, 1, 2, 3, 2, 1, 7, 1, 2, 5, 5. The "Christ" staff shows notes with scale degrees 5, 1, 2, 3, 2, 1, 7, 1, 5. Below these, a third staff shows a more complex melodic line with scale degrees 5, 1, 2, 3, 4, 3, 2, 1, 6, 5, 4, 3, 4, 5, 3, 5, 3. The fourth staff shows notes with scale degrees 5, 1, 2, 3, 4, 2, 7, 1, 3, 4, 5, 6, 4, 3, 4, 5, 3.

4. Moreover, as transcribed in Musical Example 2 in the Initial Finell Report (copied immediately above), the melodic phrase structure and melodic development within the 26-note melody in bars 1-12 in the Verse of “Emmanuel” is exceedingly similar to the corresponding melodic phrase structure and melodic development within the 26-note melody in bars 1-12 in the Verse of “Christ”. The melody in musical phrases 1, 2, and 3 in bars 1-12 of “Emmanuel” and of “Christ” is consecutively developed as a single, very long continuous melody in an exceedingly similar way as shown at paragraphs 34-44 of the Ferrara Rebuttal Report and explained here. The ways in which the melodic phrases at issue are structured and developed (or evolved) include:

- (A) The highest pitch in musical phrase 1 (bars 1-4) is on scale degree “3”, the highest pitch in musical phrase 2 (bars 5-8) is on scale degree “4”, and the highest pitch in musical phrase 3 (bars 9-12) is on scale degree “6” in both “Emmanuel” and “Christ”.
- (B) The lowest pitch in musical phrase 1 (bars 1-4) is on scale degree “5”, the lowest pitch in musical phrase 2 (bars 5-8) is on scale degree “5”, and the lowest pitch in musical phrase 3 (bars 9-12) is on scale degree “3” in both “Emmanuel” and “Christ”.

5. Thus, it is undisputed that, as shown in the 2016 Ferrara Report (copy attached hereto and hereafter, “the Initial Ferrara Report”) and in the Ferrara Rebuttal Report, the melodic development of highest and lowest pitches in musical phrases 1, 2, and 3 from bars 1-12 of the Verses in “Emmanuel” and “Christ”, *as transcribed in the Initial Finell Report*, is identical: the development of the highest notes is identical from scale degree “3” (phrase 1), to scale degree “4” (phrase 2), to scale degree “6” (phrase 3) and the development of the lowest notes is identical with scale degree “5” in phrases 1 and 2 and scale degree “3” in phrase 3, ascending exactly the interval of a perfect 4<sup>th</sup> from the lowest note on scale degree “5” in phrases 1 and 2 in “Emmanuel” and “Christ”.

6. Therefore, by any objective musicological measure, Defendants’ summary of the “gist of Ambrosetti’s theory” misrepresents and omits the significant similarities in melodic expression shared by “Emmanuel” and “Christ” *as transcribed in the Initial*

*Finell Report* (1) by miscounting the total number of pitches that are shared, 21 (not 18) out of 26 notes, with the same pitches and scale degrees, (2) by omitting the fact that 13 of those 21 notes also have the same rhythmic durations in “Emmanuel” and “Christ”, and (3) by omitting the fact that the melodic development and the melodic phrase structure in the long and contiguous 26-note melodies at issue are exceedingly similar in “Emmanuel” and “Christ”.

7. Defendants’ MSJ continues its misrepresentation at the top of page 15, writing:

“The problem with Ambrosetti's theory is that it fails to consider that "Emmanuel" and "Christ Be Our Light" have markedly different rhythms and that their notes have very different metrical placements.”

Contrarily, the Ferrara Rebuttal Report and deposition testimony demonstrate that 13 out of a total of 26 notes (50%) in the corresponding melodies at issue have the same rhythmic durations. The rhythms are not “markedly different”. Regarding metrical placements, as analyzed at paragraphs 17-18 and later in the Ferrara Rebuttal Report, the melody at issue in bars 1-12 of each Verse in “Christ” starts one beat later than the melody at issue in bars 1-12 of each Verse in “Emmanuel”. That shifting of the metrical placement of the starting note by one beat causes notes in the melodies at issue to differ in their metrical placements. However, starting the melody in “Christ” one beat later than the melody in “Emmanuel” and the resultant differences in metrical placement should not create a cover and an excuse for denying the very strong objective musicological evidence that is in support of a claim of copying as demonstrated in the Initial Ferrara Report and in the Ferrara Rebuttal Report, nor should starting a melody one beat later be allowed to undermine the very significant combined similarities in pitches, scale degrees, rhythmic durations, and exceedingly similar melodic development and phrase structure in the 26-note melodies at issue in “Emmanuel” and “Christ”. Track 1 on **Rebuttal Report Audio Exhibit 1** attached to the Ferrara Rebuttal Report demonstrates that even when all of the notes in the opening musical phrase in “Mary Had a Little Lamb” are played with different metrical placements and when the rhythmic duration is changed in one note, copying in

the altered melody and the similarity between the two melodies are evident. (See paragraph 18 of the Ferrara Rebuttal Report.)

8. The “three questions before the Court” at page 15 of Defendants’ MSJ are flawed because they relegate the similarity at issue to pitches alone and thereby fail to include the similarities in rhythmic durations, melodic development and melodic phrase structure shown in the Ferrara Initial and Rebuttal Reports. Moreover, these “three questions before the Court” fail because they pretend that musical phrase 1, musical phrase 2, and musical phrase 3 are isolated and unrelated musical phrases. As shown in the transcriptions in the Initial Finell Report and in the Ferrara Initial and Rebuttal Reports, these three musical phrases at issue constitute a continuous, contiguous 26 note melody in which musical phrase 2 develops (evolves) out of musical phrase 1 and musical phrase 3 develops (evolves) out of musical phrase 2. Defendants have failed to present any musical composition that even remotely embodies the very significant similarities in the contiguous 26-note melodies at issue.

9. Defendants’ MSJ at pages 15-16 present a defective analysis of the fourth musical phrase of “Emmanuel”. First, the *fourth* musical phrase of “Emmanuel” is not at issue. Second, the analysis at pages 15-16 in Defendants’ MSJ relies on the transcriptions in the Finell Declaration, which, as shown below, omit notes of the melodies present in the published sheet music of “Russian Easter Festival Overture” by Rimsky-Korsakov and “Chim Chim Cher-ee”.

10. At the middle of page 16 through page 21, a strained analysis of the rhythmic durations in the 26-note melodies at issue in “Emmanuel” and “Christ” is presented. First, the boxed tables on pages 17, 18, and 20 in Defendants’ MSJ are not in the Initial Finell Report or the September 2021 Finell Rebuttal Report (hereafter, “the Finell Rebuttal Report”).

11. Second, *as transcribed in the Initial Finell Report* (and shown in the musical example above), the similarities in the rhythmic durations shared by “Emmanuel” and “Christ” combined with (1) the 21 out of 26 pitches and scale degrees that are identical and (2) the exceedingly similar melodic development and melodic phrase structure over

three contiguous musical phrases, as analyzed in the Initial Ferrara Report and in the Ferrara Rebuttal Report, are summarized immediately below musical phrase by musical phrase.

### MUSICAL PHRASE 1

12. At page 16 of their MSJ, Defendants write that the notes in the first musical phrase in “Emmanuel” and “Christ” “have a very different rhythm and metrical placement”. That opinion is demonstrably wrong. Out of a total of 10 notes in musical phrase 1 in “Emmanuel”, there are 8 quarter notes and 2 longer (half) notes. Thus, the rhythmic durations and rhythmic flow of musical phrase 1 in “Emmanuel” is marked by the fact that almost all of the notes are quarter notes (all but 2), and only 2 notes are longer notes. By way of rhythmic similarity, in musical phrase 1 of “Christ”, out of a total of 9 notes, there are 7 quarter notes and 2 longer notes (a dotted half note and a half note). Thus, in both “Emmanuel” and “Christ”, the rhythmic durations and rhythmic flow of musical phrase 1 is marked by the large majority of quarter notes and exactly 2 longer notes, one of which ends musical phrase 1.

13. Moreover, musical phrase 1 in both “Emmanuel” and “Christ” begins with quarter notes (i.e., with the same rhythmic durations) on scale degrees 5-1-2, includes quarter notes (i.e., with the same rhythmic durations) on scale degrees 2-1-7, ends with a two-note rhythm of a quarter note to a half note (i.e., with the same rhythmic durations), and with that half note on the same scale degree 5. As shown at paragraph 35 in the Ferrara Rebuttal Report, all 9 notes in musical phrase 1 of “Christ” (100%) share the same scale degrees (**5-1-2-3-2-1-7-1-5**) with (9 of the total 10<sup>1</sup>) corresponding notes in “Emmanuel”. Moreover, 7 out of those 9 notes in musical phrase 1 of “Christ” share the same rhythmic durations (quarter notes in bar 1 on scale degrees **5-1-2** and in bar 3 on scale degrees **2-1-7**, and a half note on scale degree **5**) with corresponding notes in “Emmanuel”. Thus, 77.7% of the notes in musical phrase 1 of “Christ” share (1) the

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<sup>1</sup> As noted in the Ferrara Rebuttal Report, scale degree 2 in “Emmanuel” is an intervening differing scale degree in the otherwise identical sequence of pitches in musical phrase 1 of “Christ”.

same scale degrees and (2) the same rhythmic durations with notes in musical phrase 1 of “Emmanuel” *as transcribed in the Initial Finell Report*.

14. The attempt in Defendants’ MSJ to reduce the similarity to pitch alone is deeply flawed and contrary to the many similarities in rhythmic durations shared between musical phrase 1 of “Emmanuel” and “Christ”. These similarities in rhythmic durations are objectively shown in the Ferrara Rebuttal Report using transcriptions from the Finell Report. While pages 16-21 of Defendants’ MSJ obfuscate the demonstrated similarities in the rhythmic durations in musical phrase 1, the significant combined similarities in pitches, scale degrees, and rhythmic durations remain objectively present in “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

## MUSICAL PHRASE 2

15. Obfuscated and omitted in Defendants’ MSJ is the fact that musical phrase 2 in “Emmanuel” and “Christ” develops from musical phrase 1. As clearly shown in the transcriptions in the Initial Finell Report, musical phrase 2 is not an isolated musical phrase. Musical phrase 2 develops (evolves) and grows out of musical phrase 1.

16. At page 17 of their MSJ, Defendants write that the notes in the second musical phrase in “Emmanuel” and “Christ” “have a very different rhythm and metrical placement”. That opinion is demonstrably wrong. Similarities in *the rhythmic durations of the notes* in the second musical phrase include the fact that out of a total of 8 notes in “Emmanuel”, there are 7 quarter notes and one long note that ends the second musical phrase. By way of rhythmic similarity, out of a total of 8 notes in the second musical phrase of “Christ”, there are 6 quarter notes and two long notes, the second of which, as in “Emmanuel”, ends the second musical phrase. By further way of similarity, all of the long notes in the second musical phrase in “Emmanuel” and “Christ” are on the same “stressed” metrical placement on beat 1 of the bar. Thus, in both “Emmanuel” and “Christ”, the rhythmic durations and rhythmic flow of musical phrase 2 are marked by the large majority of quarter notes and only 1 or 2 notes longer notes, one of which ends musical phrase 2.

17. Musical phrase 2 in both “Emmanuel” and “Christ” begins with quarter notes (i.e., with the same rhythmic durations) on scale degrees 5-1-2, includes quarter notes (i.e., with the same rhythmic durations) on 4 and 2, and ends with a long note on scale degree 1, with the same metrical placement. The long note (a dotted half note tied to a half note in “Emmanuel” and a dotted half note in “Christ”) functions as a long-note-ending of musical phrase 2 in both “Emmanuel” and “Christ”. As shown at paragraphs 38-39 in the Ferrara Rebuttal Report, 6 out of a total of 8 notes (75%) in “Christ” share the same scale degrees (**5-1-2-3-4-[2-7]-1**) with 8 corresponding notes in “Emmanuel”<sup>2</sup>. Moreover, 4 of the 8 notes (50%) in Phrase 2 of “Christ” share the same rhythmic durations (quarter notes in bar 1 on scale degrees **5-1-2** and in bar 3 on scale degree **4**) with corresponding notes in “Emmanuel”.

18. By way of additional similarities, as shown in the Initial Ferrara Report and in the Ferrara Rebuttal Report (and summarized at paragraphs 5-6 above), the melodic similarities in musical phrase **1** are consecutively developed and extended in musical phrase **2** in both “Emmanuel” and “Christ”. Defendants have failed to present any musical composition that even remotely embodies the similarities in the contiguous musical phrases 1 and 2 at issue, let alone in musical phrases 1, 2, and 3.

### MUSICAL PHRASE 3

19. Obfuscated and omitted in Defendants’ MSJ is the fact that musical phrase 3 in “Emmanuel” and “Christ” develops from the preceding contiguous musical phrase 2 which in turns develops from the preceding contiguous musical phrase 1. As clearly shown in the transcriptions in the Initial Finell Report, musical phrase 3 is not an isolated musical phrase. Rather it continues the melodic development of the 26-note melody at issue in “Emmanuel” and “Christ”.

20. At page 19 of their MSJ, Defendants write that the notes in the third musical phrase in “Emmanuel” and “Christ” have “a very different rhythm and metrical placement”. That opinion is demonstrably wrong. Similarities in the rhythmic durations

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<sup>2</sup> As noted above, scale degree 3 in “Emmanuel” and scale degree 7 in “Christ” are intervening differing scale degrees.

of the notes in the third musical phrase in both “Emmanuel” and “Christ” include the fact that out of a total of 8 notes in “Emmanuel”, there are 5 quarter notes and three longer (half) notes, the last of which ends the third musical phrase. By way of rhythmic similarity, out of a total of 9 notes in the third musical phrase of “Christ”, there are 7 quarter notes and 2 long notes, the last of which, as in “Emmanuel”, ends the third musical phrase. Moreover, the third musical phrase in “Emmanuel” and “Christ” features a high note on scale degree 6 (the highest note and the only iteration of that high note in the entire 26-note melodies at issue) as a long rhythmic duration note (a half note in “Emmanuel” and a dotted half note in “Christ”) that is on the same metrical placement, the downbeat (beat 1) of the bar in both “Emmanuel” and “Christ”. Moreover, there are three quarter notes (*i.e.*, with the same rhythmic durations) on scale degrees 4-3-4 in musical phrase 3 in both “Emmanuel” and “Christ” and with the same metrical placements, respectively on beats 1, 2, and 3.

21. At page 20 of their MSJ, Defendants opine that, with respect to “the 4-3-4-5-3 pitch sequence from the middle of” musical phrase 3 in “Emmanuel” and the notes at the end of musical phrase 3 in “Christ”, “their [metrical] placement and very different rhythms, are not at all similar”. That opinion is patently false. As transcribed in the Initial Finell Report and, for example, shown in the Ferrara Rebuttal Report’s **Rebuttal Report Musical Example 1** (shown at the beginning of this Declaration), the first 8 of a total of 9 notes in musical phrase 3 in “Emmanuel” consists of the pitch sequence 6-5-4-3-4-5-3. Starting on bar 2 of musical phrase 3 in “Christ”, the pitch sequence is 6- 4-3-4-5-3. As transcribed in the Initial Finell Report and earlier in this Declaration, comparing the rhythmic durations and metrical placements of each of these corresponding pitches in the order in which they are played:

- Scale degree **6** in “Emmanuel” and “Christ” is a long note (longer than a quarter note) on beat 1 (*i.e.*, with the same metrical placement), which is a stressed beat;
- Scale degree **4** in “Emmanuel” and “Christ” is a quarter note (*i.e.*, with the same rhythmic duration) on beat 1 (*i.e.*, with the same metrical placement), which is a stressed beat;

- Scale degree **3** in “Emmanuel” and “Christ” is a quarter note (i.e., with the same rhythmic duration) on beat 2 (i.e., with the same metrical placement), which is an unstressed beat;
- Scale degree **4** in “Emmanuel” and “Christ” is a quarter note (i.e., with the same rhythmic duration) on beat 3 (i.e., with the same metrical placement), which is an unstressed beat;
- Scale degree **5** is a half-note in “Emmanuel” and a quarter note in “Christ” on beat 1 (i.e., with the same metrical placement), which is a stressed beat; and
- Scale degree **3** is a quarter note on beat 3 in “Emmanuel” and a half-note on beat 2 in “Christ”, which are unstressed beats

Thus, as transcribed in the Initial Finell Report and shown above and in the Ferrara Rebuttal Report, Defendants’ opinion in their MSJ that in these portions of musical phrase 3 in “Emmanuel” and “Christ”, “their [metrical] placement and very different rhythms, are not at all similar”, is demonstrably false and contradicted by the transcriptions in the Initial Finell Report.

22. Indeed, as noted at paragraph 45 of the Ferrara Rebuttal Report, in Paragraph 4 of the Initial Finell Report, the analysis of the third musical phrase omits one bar in each song, namely bar 12 in “Emmanuel” and bar 9 in “Christ”. That omission aligns the melodies in bars 9-11 of “Emmanuel” with bars 10-12 of “Christ” which facilitates a comparative analysis. *Consistent with that alignment in the Initial Finell Report, Rebuttal Report Musical Example 5* in the Ferrara Rebuttal Report (copied immediately below) aligns bars 9 – 11 in “Emmanuel” with bars 10 – 12 in “Christ”. Therein, 6 out of a total of 6 notes (100%) in “Christ” share the same scale degrees (**6-4-3-4-5-3**), 5 out of a total of 6 notes share the same metrical placements (**6-4-3-4-5**) and 3 of those 6 notes in “Christ” share the same scale degree, metrical placements, and rhythmic durations (quarter notes) on scale degrees **4-3-4** with corresponding notes in “Emmanuel”.<sup>3</sup>

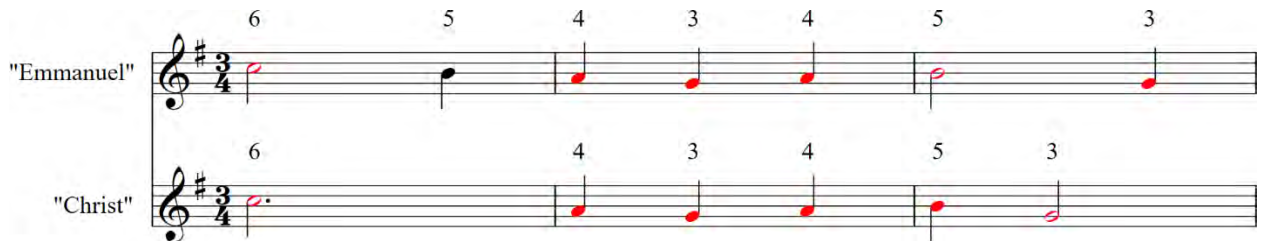
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<sup>3</sup> At paragraph 41 and in Rebuttal Report Musical Example 4 of the Ferrara

## REBUTTAL REPORT MUSICAL EXAMPLE 5

### Bars 9-11 of “Emmanuel” and Bars 10-12 of “Christ”

Notes with the same scale degree are highlighted in red



23. Importantly, the melodic similarities that are in musical phrase 1 are consecutively developed and extended in musical phrase 2, which are then consecutively developed and extended in musical phrase 3, thereby creating an exceedingly similar melodic development and melodic phrase structure of the 26-note, 12-bar melodies at issue in “Emmanuel” and “Christ”. Defendants have failed to present any musical composition that even remotely embodies the similarities in melodic expression embodied in the contiguous 26-note melodies at issue.

24. Thus, at the bottom of page 20 to the top of page 21 in their MSJ, Defendants’ attempt to reduce the expression at issue in musical phrase 3 to three notes is without substance and flawed. Defendants cite *Newton v. Diamond*, a litigation in which I was the expert musicologist on behalf of defendants Diamond *et al.* In *Newton v. Diamond*, the entirety of musical expression at issue was a three-note melody. By way of very significant difference, in the instant case, there are six notes of similarity between musical phrase 3 of “Emmanuel” and “Christ”, twice as many as in *Newton*, as shown immediately above and in transcriptions in the Initial Finell Report. Moreover, as shown in the Ferrara Initial and Rebuttal Reports and in my deposition testimony, musical phrases 1 and 2 in “Emmanuel” and “Christ” embody many additional similarities in

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Rebuttal Report, an analysis and transcription of the full 4-bar musical phrase 3 in “Emmanuel” and “Christ” are presented.

melodic expression including an exceedingly similar melodic development and melodic phrase structure of the 26-note, 12-bar melodies at issue. Therefore, from a musicological perspective, the opinion in *Newton v. Diamond* cited by Defendants regarding a three-note melody is quite distant from and below the significantly greater substantiality of similarities in melodic expression shared by “Emmanuel” and “Christ”.

### STRESSED AND UNSTRESSED NOTES

25. Starting at page 16 and thereafter in the portion of Defendants’ MSJ under discussion is a discussion of “stressed” notes (which are on the strong beat 1 in 3/4 meter) and “unstressed” notes (which are on the weak beats 2 and 3 in 3/4 meter). However, the boxed tables at pages 17, 18 and 20 of Defendants’ MSJ obfuscate the similarities in notes that have the same scale degree (pitch) and their stressed or unstressed metrical placement. In fact, as shown above and in the Ferrara Initial and Rebuttal Reports, there are many similarities in metrical placements in the melodies at issue in “Emmanuel” and “Christ” but one cannot see those similarities in the boxed tables in Defendants’ MSJ. For example, similarities in stressed and unstressed notes with the same scale degree are explained at paragraphs 19-23 above with respect to musical phrase 3, but are not visually apparent in the boxed tables.

26. The boxed tables at pages 17, 18, and 20 obfuscate and make virtually impossible the ability to “see” these similarities in the scale degrees with stressed and unstressed placements, even though these objective similarities are evident in the transcriptions in the Initial Finell Report and the Ferrara Initial and Rebuttal Reports.

### “AWAKE, AWAKE TO LOVE AND WORK”

27. At page 18, Defendant’s MSJ introduces the hymn, “Awake, Awake to Love and Work” (hereafter, “Awake”). This work is never mentioned in the Initial Finell Report, the Finell Rebuttal Report, or in the Finell Declaration.

28. In the scale degree chart at page 19 of Defendants’ MSJ, the scale degrees of “Awake” are compared with scale degrees in musical phrase 2 in “Emmanuel” and “Christ”. However, as shown in the sheet music of “Awake” in Exhibit 7 of Defendants’

MSJ, the *first* musical phrase from “Awake” is being compared with the *second* musical phrase in “Emmanuel” and “Christ”. Defendants’ MSJ is mixing and matching an isolated musical phrase 1 from “Awake” and comparing it with musical phrase 2 in “Emmanuel” and “Christ”. This is an example of Defendants’ MSJ’s obfuscation and omission of the fact that the *second* musical phrase grows out of and develops from the *first* musical phrase in both “Emmanuel” and “Christ”. No such similarity is present in the single, *first* musical phrase from “Awake” as presented in Defendants’ MSJ.

29. “Awake” is in 4/4 meter, not 3/4 meter as in “Emmanuel” and “Christ”. While Defendants present a strained analysis of “stressed” notes in “Emmanuel” and “Christ” in the boxed tables at pages 17, 18, and 20 of their MSJ, by way of analytical inconsistency, they fail to provide an analysis of the very different stressed notes between the first musical phrase of “Awake” and the second musical phrase in “Emmanuel” and “Christ”. That omission by Defendants is corrected here. The following is a comparative transcription of the *first* musical phrase in “Awake” as written in the sheet music attached as Exhibit 7 in Defendants’ MSJ and the *second* musical phrase in “Emmanuel” as transcribed in the Initial Finell Report and in the Duboff Declaration. In the transcription below, scale degree numbers are written above the notes and purple accent markings are input over the stressed notes, i.e., notes on beat 1 of each bar. As shown in the musical example immediately below, only one stressed note (on scale degree 1) is the same between the musical phrases in issue in “Awake” and “Emmanuel”.

**“Awake, Awake To Love and Work” on the top staff**

**“Emmanuel” second musical phrase on the bottom staff**

The image displays a comparative musical transcription of two phrases. The top staff, labeled "Awake, Awake To Love and Work", is in 4/4 time and consists of ten notes: G4 (scale degree 5), A4 (1), B4 (2), C5 (3), D5 (4), C5 (3), B4 (2), A4 (1), G4 (7), and F#4 (5). Purple accent markings (>) are placed above the first note (G4) and the sixth note (C5). The bottom staff, labeled "Emmanuel", is in 3/4 time and consists of eight notes: G4 (5), A4 (1), B4 (2), C5 (3), D5 (4), C5 (3), B4 (2), and A4 (1). Purple accent markings (>) are placed above the first note (G4), the third note (C5), and the seventh note (A4).

30. The following is a comparative transcription of the *first* musical phrase in “Awake” (as per the Exhibit 7 sheet music) and the *second* musical phrase in “Christ” as transcribed in the Initial Finell Report and in the Duboff Declaration. Scale degree numbers are written above the notes and purple accent markings are input over the stressed notes, i.e., notes on beat 1 of each bar. As shown in the musical example immediately below, not a single stressed note is the same between the musical phrases in issue in “Awake” and “Christ”.

**“Awake, Awake To Love and Work” on the top staff**

**“Christ” second musical phrase on the bottom staff**

The image shows two musical staves. The top staff is for the phrase "Awake, Awake To Love and Work" in 4/4 time, G major. It consists of two measures. The first measure has notes C4, E4, G4, A4 with scale degrees 5, 1, 2, 3 above them. The second measure has notes B4, A4, G4, E4 with scale degrees 4, 3, 2, 1 above them. Purple accents are placed over the first notes of each measure (C4 and B4). The bottom staff is for the phrase "Christ Be Our Light" in 3/4 time, G major. It consists of two measures. The first measure has notes C4, E4, G4 with scale degrees 5, 1, 2 above them. The second measure has notes B4, A4, G4 with scale degrees 4, 2, 1 above them. Purple accents are placed over the first notes of each measure (C4 and B4).

### “HURON CAROL”

31. In the scale degree chart at page 19 of Defendants’ MSJ, the scale degrees of “Huron Carol” are compared with scale degrees in musical phrase 2 in “Emmanuel” and “Christ”. Again, Defendants’ MSJ is mixing and matching an isolated musical phrase 1 from “Huron Carol” and comparing it with musical phrase 2 in “Emmanuel” and “Christ”. This is yet another example of Defendants’ MSJ’s obfuscation and omission of the fact that the *second* musical phrase grows out of and develops from the *first* musical phrase in both “Emmanuel” and “Christ”. No such similarity is present in the single, *first* musical phrase from “Huron Carol” as presented in Defendants’ MSJ. “Huron Carol” is in 4/4 meter in Exhibit 6 of Defendants’ MSJ, not 3/4 meter as in “Emmanuel” and “Christ”.

Again, the stressed notes in 4/4 meter occur once every 4 beats, but by way of difference, the stressed notes in 3/4 meter occur every 3 beats.

THE SIMILARITIES ARE NOT “COINCIDENTAL”

32. At the top of page 22 of their MSJ, Defendants’ write:

“At most, Ambrosetti can show some coincidental similarities in the pitch sequences in the opening two phrases, but the rhythms and metrical placements are very different and in the context of the totality of both pieces.”

However, using the transcriptions in the Initial Finell Report, the Ferrara Rebuttal Report shows that 21 out of a total of 26 notes (80.7%) in the corresponding melodies in bars 1-12 of the Verses in “Emmanuel” and “Christ” share the same pitches and scale degrees, and 13 of those 21 shared pitches also have the same rhythmic durations.

33. Moreover, as transcribed in Musical Example 2 in the Initial Finell Report (copied above), the melodic phrase structure and melodic development within the 26-note melody in bars 1-12 in the Verse of “Emmanuel” is exceedingly similar to the corresponding melodic phrase structure and melodic development within the 26-note melody in bars 1-12 in the Verse of “Christ”. The melody in musical phrases 1, 2, and 3 in bars 1-12 of “Emmanuel” and of “Christ” is consecutively and contiguously developed as a single, very long continuous melody in an exceedingly similar way as analyzed and shown at paragraphs 34-44 of the Ferrara Rebuttal Report. Indeed, as shown in the Ferrara Initial and Rebuttal Reports, the melodic development of highest and lowest pitches in musical phrases 1, 2, and 3 from bars 1-12 of the Verses in “Emmanuel” and “Christ”, *as transcribed in the Initial Finell Report*, is identical: the development of the highest notes is identical from scale degree “3” (phrase 1), to scale degree “4” (phrase 2), to scale degree “6” (phrase 3) and the development of the lowest notes is identical.

34. Thus, there is very strong musicological evidence to support a finding that the extensive and significant similarities in melodic expression are the result of copying. Moreover, these significant similarities between “Emmanuel” and “Christ” are very

substantial “in the context of the totality of both pieces”: 75% of the melody of every Verse in “Emmanuel” (bars 1-12 of each 16-bar Verse) is at issue.

35. Regarding metrical placements, as analyzed at paragraphs 17-18 and later in the Ferrara Rebuttal Report, the melody at issue in bars 1-12 of each Verse in “Christ” starts one beat later than the melody at issue in bars 1-12 of each Verse in “Emmanuel”. That shifting of the metrical placement of the starting note by one beat causes notes in the melodies at issue to differ in their metrical placements. However, starting the melody in “Christ” one beat later than the melody in “Emmanuel” should not create a cover and an excuse for denying the very strong objective musicological evidence of copying, nor does starting a melody one beat later undermine the very significant combined similarities in pitches, scale degrees, rhythmic durations, and melodic development and phrase structure in the 26-note melodies at issue in “Emmanuel” and “Christ”. Moreover, as shown above, there are similarities in the metrical placements of corresponding notes in the melodies at issue in “Emmanuel” and “Christ”.

### **THE DECLARATION OF LEONARD DUBOFF**

#### **“HURON CAROL”**

36. A transcription of a portion of “Huron Carol” is presented at page 4 of the Leonard Duboff Declaration. As noted above, in the scale degree chart at page 19 of Defendants’ MSJ, the scale degrees of “Huron Carol” are compared with musical phrase 2 in “Emmanuel” and “Christ”. The scale degrees of “Huron Carol” that are charted at page 19 of Defendants’ MSJ are consistent with Defendants’ Exhibit 6, which is the sheet music of “Huron Carol”. However, the notes in the transcription at page 4 of “Huron Carol” and the related scale degree sequence at the bottom of the previous page 3 in the Duboff Declaration are inconsistent with the scale degrees in the chart on page 19 of the MSJ and the “Huron Carol” sheet music at Defendants’ Exhibit 6; the transcription of the musical phrase from “Huron Carol” in the Duboff Declaration omits the last six notes, namely on scale degrees 7-1-1-2-7-1, which are very different from the notes in musical phrase 2 in both “Emmanuel” and “Christ”. Thus, almost half of the

notes in the opening musical phrase in “Huron Carol” are omitted in the transcription and related audio in the Duboff Declaration.

37. Further, as shown in the sheet music of “Huron Carol” in Defendants’ Exhibit 6, the *first* musical phrase from “Huron Carol” is compared with the *second* musical phrase in “Emmanuel” and “Christ” in the Duboff Declaration. As noted above, this is another example of obfuscation and the omission of the fact that the *second* musical phrase grows out of and develops the *first* musical phrase in both “Emmanuel” and “Christ”. No such similarity can be found in the *first* musical phrase from “Huron Carol”.

38. “Huron Carol” is in 4/4 meter in Exhibit 6 of Defendants’ MSJ, not 3/4 meter as in “Emmanuel” and “Christ”. Moreover, by way of additional inconsistency, the transcription of “Huron Carol” at page 27 of the Initial Finell Report is in 2/4 meter, not 4/4 meter as transcribed in the Duboff Declaration.

#### “AWAKE, AWAKE TO LOVE AND WORK”

39. A transcription of a portion of “Awake, Awake to Love and Work” (hereafter, “Awake”) is presented at page 4 of the Duboff Declaration. “Awake” is never mentioned in the Initial Finell Report, the Finell Rebuttal Report, or in the Finell Declaration.

40. The scale degrees in “Awake” that are charted at page 19 of Defendants’ MSJ are consistent with Defendants’ Exhibit 7, which is the sheet music of “Awake”. However, the notes transcribed and the scale degree sequence presented above the transcription of “Awake” at page 4 of the Duboff Declaration are inconsistent with the scale degrees in the chart at page 19 of Defendants’ MSJ and the “Awake” sheet music in Defendants’ Exhibit 7. The transcription of the musical phrase from “Awake” in the Duboff Declaration omits the last two notes, namely on scale degrees 7-5, which are different from the final 2 notes in musical phrase 2 in both “Emmanuel” and “Christ”.

41. Further, as shown in the sheet music of “Awake” in Exhibit 7 of Defendants’ MSJ, the *first* musical phrase from “Awake” is compared with the *second* musical phrase in “Emmanuel” and “Christ” in the Duboff Declaration. As noted above, this is another example of obfuscation and the omission of the fact that the *second* musical phrase

grows out of and develops from the *first* musical phrase in both “Emmanuel” and “Christ”. No such similarity is present in the single, *first* musical phrase from “Awake”.

#### THE FOURTH MUSICAL PHRASE IN “EMMANUEL”

42. Even though the Initial Finell Report and the Ferrara Initial and Rebuttal Reports find that the fourth musical phrase in “Emmanuel” and “Christ” are not at issue, the Duboff Declaration presents transcriptions of portions of two earlier works, “Russian Easter Festival Overture” and “Chim Chim Cher-ee”, with pitch sequences that are similar to the pitch sequence in the fourth musical phrase in “Emmanuel”. While the transcriptions of the fourth musical phrases in “Emmanuel” and “Christ” in the Duboff Declaration are consistent with transcriptions in the Ferrara Initial and Rebuttal Reports and in the Initial Finell Report, the transcriptions of the two preexisting works in the Duboff Declaration omit notes as compared with the published sheet music as explained below.

#### “RUSSIAN EASTER FESTIVAL OVERTURE”

43. A transcription of a portion of “Russian Easter Festival Overture” (hereafter, “Overture”) by Rimsky-Korsakov is presented at page 5 of the Duboff Declaration. Defendants’ MSJ fails to provide the sheet music score of this work. I downloaded the sheet music of the full 101-page score of this work and attached (as Ferrara Declaration Visual Exhibit A) the first 7 pages thereof including the first page of the score that contains the melody under discussion.

44. The scale degrees and notes in the transcription of “Overture” at page 5 of the Duboff Declaration are not the same as the attached sheet music because the first three notes are omitted in the Duboff Declaration. Those omitted notes (on scale degree 3-3-4) are different from the notes in musical phrase 4 in the both “Emmanuel” and “Christ”.

45. As shown in the sheet music of “Overture” in the attached Declaration Visual Exhibit A, the *second* musical phrase from “Overture” is compared with the *fourth* musical phrase in “Emmanuel” in the Duboff Declaration. Moreover, “Overture” is in 5/2 meter, which is different from the 3/4 meter of both “Emmanuel” and “Christ”.

“Chim Chim Cher-ee”

46. A transcription of a portion of “Chim Chim Cher-ee” (hereafter, “Chim Chim”) from *Mary Poppins* is presented at page 5 of the Duboff Declaration. Defendants’ MSJ fails to provide the sheet music score of this work. I downloaded the published sheet music from musicnotes.com and attached it as Ferrara Declaration Visual Exhibit B.

47. The scale degrees and notes in the transcription of “Chim Chim” at page 5 of the Duboff Declaration are not the same as in the attached sheet because the first four notes of the melodic phrase from “Chim Chim” are omitted in the Duboff Declaration transcription. Those omitted notes (on scale degrees 4-4-5-4) in “Chim Chim” are different from the notes in musical phrase 4 in “Emmanuel”.

**THE DECLARATION OF JUDITH FINELL**

48. At paragraph 3, the Finell Declaration duly notes that musical phrase 4 in the Verses of “Emmanuel” and “Christ” differ and are not at issue. Then at paragraph 4 at pages 2-3 and in Finell Exhibit 1 at page 5, the Finell Declaration presents portions of “Chim Chim Cher-ee”, “Russian Easter Festival Overture”, and “Sunrise Sunset” that have pitch sequences that are similar to the pitch sequence in musical phrase 4 (which is not at issue) in “Emmanuel”.

“CHIM CHIM CHER-EE”

49. At paragraph 4, the Finell Declaration discusses “Chim Chim Cher-ee” (hereafter, “Chim Chim”) from *Mary Poppins*. A transcription of a portion of “Chim Chim” is presented at page 5 of the Finell Declaration. The Finell Declaration fails to provide the sheet music of this work. As noted above with respect to the Duboff Declaration, I downloaded the published sheet music from musicnotes.com and attached it hereto as Ferrara Declaration Visual Exhibit B. The scale degrees and notes in the transcription of “Chim Chim” at page 5 of the Finell Declaration are not the same as in the attached published sheet because the first four notes of the phrase from “Chim Chim” are omitted in the Finell Declaration transcription. Those omitted notes (on scale degrees 4-4-5-4) in “Chim Chim” are different from the notes in musical phrase 4 in “Emmanuel”. At

paragraph 4, the Finell Declaration only discusses the pitches in “Chim Chim”. There is no discussion of the rhythmic durations or metrical placements of the notes in “Chim Chim”.

#### “RUSSIAN EASTER FESTIVAL OVERTURE”

50. At paragraph 4, the Finell Declaration discusses “Russian Easter Festival Overture” (hereafter, “Overture”). A transcription of a portion of “Overture” is presented at page 5 of the Finell Declaration. The Finell Declaration fails to provide the sheet music of this work. As noted above with respect to the Duboff Declaration, I downloaded the sheet music of the full 101-page score of this work and attached (as Ferrara Declaration Visual Exhibit A) the first 7 pages thereof including the first page of the score which contains the melody under discussion.

51. First, the scale degrees and notes in the transcription of “Overture” at page 5 of the Finell Declaration are not the same as in the attached sheet music because the first three notes of the phrase from “Overture” are omitted in the Finell Declaration transcription. Those omitted notes (on scale degrees 3-3-4 preceding scale degree 5) in “Overture” are different from the notes in musical phrase 4 in “Emmanuel”.

52. Second, the musical phrase from “Overture” is clearly the second musical phrase of that work, not the first musical phrase as the Finell Declaration mistakenly states. Thus, the second musical phrase from “Overture” is compared with the fourth musical phrase of “Emmanuel”.

53. Third, “Overture” is in 5/2 meter which is very different from the 3/4 meter in “Emmanuel”. Indeed, the stressed notes are very different in the musical phrase from “Overture” and the fourth musical phrase of “Emmanuel”.

54. In order to illustrate this, the comparative transcription below places the second musical phrase in “Overture” on the top staff and the fourth musical phrase in “Emmanuel” on the bottom staff. Scale degrees are listed above each note and purple accents marks are placed over stressed notes that are on beat 1 of the bar.

**“Russian Easter Festival Overture” musical phrase 2****“Emmanuel” musical phrase 4**

The image shows a comparative musical transcription of two musical phrases. The top staff, labeled "Russian Easter Overture", is in 5/2 time and contains 12 notes. The bottom staff, labeled "Emmanuel", is in 3/4 time and contains 12 notes. Above each note is a red scale degree number (1-5). Purple accent marks (>) are placed above the notes on beat 1 of each bar in both phrases. The lyrics "and die, our ran-som for sin." are written below the bottom staff.

Phrase	Staff	Time Signature	Note 1	Note 2	Note 3	Note 4	Note 5	Note 6	Note 7	Note 8	Note 9	Note 10	Note 11	Note 12
"Russian Easter Overture"	Top	5/2	3	3	4	5	3	3	4	3	2	3	2	1
"Emmanuel"	Bottom	3/4	3	4	3	2	3	2	1					

and die, our ran-som for sin.

55. As shown in the comparative transcription immediately above, out of a total of 12 notes in “Overture”, only one corresponding note in “Emmanuel” is the same in pitch and metrical placement, namely, the last pitch on scale degree 1. In addition, out of 12 notes, only the last pitch is a “stressed” pitch, i.e., it is on beat 1 of the bar in both the musical phrase 2 of “Overture” and musical phrase 4 of “Emmanuel”.

56. In the comparative transcription immediately below, insofar as the Finell Declaration may have conflated them, the first and the second musical phrases in “Overture” are on the top staff and the fourth musical phrase in “Emmanuel” is on the bottom staff. Scale degrees are listed above each note and purple accents marks are placed over stressed notes that are on beat 1 of the bar.

**“Russian Easter Festival Overture” musical phrases 1 and 2****“Emmanuel” musical phrase 4**

The image shows a comparative musical transcription of two musical phrases. The top staff, labeled "Russian Easter Overture", is in 5/4 time and contains 17 notes. Above the staff, scale degrees are indicated in red: 3, 3, 3, 2, 1, 3, 3, 4, 5, 3, 3, 4, 3, 2, 3, 2, 1. Purple accents (greater-than signs) are placed above the first, fourth, eighth, and thirteenth notes. The bottom staff, labeled "Emmanuel", is in 3/4 time and contains 7 notes. Above the staff, scale degrees are indicated in red: 3, 4, 3, 2, 3, 2, 1. Purple accents are placed above the first, second, fourth, and sixth notes. Below the bottom staff, the lyrics "and die, our ran-som for sin." are written, with a line indicating the continuation of the phrase.

57. As shown in the comparative transcription immediately above, out of a total of 17 notes in “Overture”, only one corresponding note in “Emmanuel” is the same in pitch and metrical placement, namely, the last pitch on scale degree 1. In addition, out of 17 notes, only the last pitch is a “stressed” pitch, i.e., it is on beat 1 of the bar in both “Overture” and “Emmanuel”.

**“Sunrise Sunset”**

58. At paragraph 4, the Finell Declaration discusses “Sunrise, Sunset”. A transcription of a portion of “Sunrise, Sunset” is presented at page 5 of the Finell Declaration. The Finell Declaration fails to provide the sheet music of this work. I downloaded the published sheet music from musicnotes.com and attached it hereto as Ferrara Declaration Visual Exhibit C. The scale degrees and notes in the transcription of “Sunrise, Sunset” at page 5 of the Finell Declaration are not the same as in the attached published sheet because the first three notes of the phrase from “Sunrise, Sunset” are omitted in the Finell Declaration transcription. Those omitted notes (on scale degrees 4-4-4) in “Sunrise, Sunset” are different from the notes in musical phrase 4 in “Emmanuel”. At paragraph 4, the Finell Declaration only discusses the pitches in “Sunrise, Sunset”. There is no analysis of the rhythmic durations or metrical placements of the notes in “Sunrise, Sunset”.

PARAGRAPH 5 IN THE FINELL DECLARATION

59. At paragraph 5, the Finell Declaration opines that musical phrase 1 of “Emmanuel” and “Christ” “differ rhythmically and do not align metrically”. However, refuting that opinion regarding musical phrase 1 is the fact that while there are some differences in rhythmic durations and metrical placements, there are also many similarities between “Emmanuel” and “Christ” in musical phrase 1, *as transcribed in the Initial Finell Report*. Out of a total of 10 notes in musical phrase 1 in “Emmanuel”, there are 8 quarter notes and only 2 longer notes (half notes). Thus, the rhythmic durations and flow of musical phrase 1 in “Emmanuel” is marked by the fact that almost all of the notes are quarter notes (all but 2), and only 2 notes are longer notes. By way of rhythmic similarity, in musical phrase 1 of “Christ”, out of a total of 9 notes, there are 7 quarter notes and only 2 longer notes (a dotted half note and a half note). Thus, in both “Emmanuel” and “Christ”, the rhythmic durations and rhythmic flow of musical phrase 1 is marked by the large majority of quarter notes and only 2 notes longer notes, one of which ends musical phrase 1, as transcribed in the Initial Finell Report.

60. Further refuting the opinion in the Finell Declaration regarding musical phrase 1 in “Emmanuel” and “Christ” cited immediately above, musical phrase 1 in both “Emmanuel” and “Christ” begins with quarter notes (i.e., with the same rhythmic durations) on scale degrees 5-1-2, includes quarter notes (i.e., with the same rhythmic durations) on scale degrees 2-1-7, and ends with a two-note rhythm of a quarter note to a half note (i.e., with the same rhythmic durations), with that half note on the same scale degree 5. As shown at paragraph 35 in the Ferrara Rebuttal Report, all 9 notes in musical phrase 1 of “Christ” (100%) share the same scale degrees (**5-1-2-3-2-1-7-1-5**) with (9 of the total 10<sup>4</sup>) corresponding notes in “Emmanuel”. Moreover, 7 out of those 9 notes in musical phrase 1 of “Christ” share the same rhythmic durations (quarter notes in bar 1 on scale degrees **5-1-2** and in bar 3 on scale degrees **2-1-7**, and a half note on

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<sup>4</sup> As noted in the Ferrara Rebuttal Report, scale degree 2 in “Emmanuel” is an intervening differing scale degree in the otherwise identical sequence of pitches in musical phrase 1 of “Christ”.

scale degree **5**) with corresponding notes in “Emmanuel”. Thus, 77.7% of the notes in musical phrase 1 of “Christ” share (1) the same scale degrees and (2) the same rhythmic durations with musical phrase 1 of “Emmanuel” *as transcribed in the Initial Finell Report*.

61. As to the fact that musical phrase 1 in “Emmanuel” begins on an upbeat and musical phrase 1 in “Christ” starts a beat later, as discussed above and in the Ferrara Rebuttal Report, the melody at issue in bars 1-12 of each Verse in “Christ” starts one beat later than the melody at issue in bars 1-12 of each Verse in “Emmanuel”. That shifting of the metrical placement of the starting note by one beat causes notes in the melodies at issue to differ in their metrical placements. However, when objective musicological evidence in support of a claim of copying is strongly established (as it is in this case) and when, in that copying, the metrical placement of the starting note of a melody is changed, the resultant metrical placements of the notes at issue are much less informative. Starting the melody in “Christ” one beat later than the melody in “Emmanuel” should not create a cover and an excuse for denying the very strong objective musicological evidence of copying, nor should starting a melody one beat later be allowed to undermine the very significant similarities in the very long 26-note melodies over 12-bars at issue in “Emmanuel” and “Christ”. This is exemplified in Track 1 of **Rebuttal Report Audio Exhibit 1** attached to the Ferrara Rebuttal Report which shows that even when all of the notes in the opening melodic phrase in “Mary Had a Little Lamb” are played with different metrical placements and when the rhythmic duration is changed in one note, copying in the altered melody and the similarity between the two melodies are evident.

#### PARAGRAPH 6 IN THE FINELL DECLARATION

62. At paragraph 6, the Finell Declaration notes that a natural minor key is commonplace and ending melodic phrases in a natural minor key on a particular scale degree such as 1, 3, or 5 is commonplace. The Finell Declaration also notes that ending a melodic phrase on the same scale degree upon which it has begun is commonplace. I agree. But the Finell Declaration, like the Initial Finell Report, fails to

acknowledge the very significant other similarities in melodic expression in the 26-note melodies over 12 bars in “Emmanuel” and “Christ” in which (1) 21 out of a total of 26 contiguous notes have the same pitch and scale degree and that 13 of those 21 notes also share the same rhythmic durations and (2) the melodic phrase structure and melodic development within the 26-note melody in bars 1-12 in the Verse of “Emmanuel” is exceedingly similar to the corresponding melodic phrase structure and melodic development within the 26-note melody in bars 1-12 in the Verse of “Christ”. The melody in musical phrases 1, 2, and 3 in bars 1-12 of “Emmanuel” and of “Christ” is consecutively and contiguously developed as a single, very long continuous melody in an exceedingly similar way as analyzed and shown at paragraphs 34-44 of the Ferrara Rebuttal Report and objectively corroborated in the transcriptions in the Initial Finell Report.

#### THE TABLE ON PAGE 5

63. The table at the bottom of page 5 of the Finell Declaration gives the specific number of what it describes as “identical” scale degrees, and descriptors regarding “rhythms”, “metrical positions”, and “chords”. The descriptors, namely, “similar” and “dissimilar”, are not informative regarding musical phrase 4 in “Emmanuel”, which is not at issue.

Respectfully submitted,

March 15, 2022

By: Lawrence Ferrara, Ph.D.




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For: Lawrence Ferrara, Inc.

# **VISUAL EXHIBIT A**

Изданія М.П.БѢЛЯЕВА въ Лейпцигѣ

# Н. Римскій-Корсаковъ Свѣтлый Праздникъ

## La Grande Pâque Russe.

Ouverture

sur des Thèmes de l'Eglise Russe

pour

Grand Orchestre

par

**N. Rimsky-Korsakow.**

Op. 36.

Partition d'orchestre Pr.  $\frac{M.}{R.} \frac{8.-}{2.80}$

Parties d'orchestre Pr.  $\frac{M.}{R.} \frac{15.-}{5.25}$

Parties supplémentaires à  $\frac{M.}{R.} \frac{.-.80}{.-.30}$

Réduction pour Piano à quatre mains par S. Blumenfeld Pr.  $\frac{M.}{R.} \frac{4.-}{1.40}$

Réduction pour Piano à deux mains par Paur Gilson Pr.  $\frac{M.}{R.} \frac{2.50}{.-.90}$

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M. P. Belaïeff, Leipzig.

1890

245

Edition M. P. BELAÏEFF, Leipzig







Анастас  
Мускопачако "Золотая".

Анастас  
де Мускопачако и де Бордино.

## ПРОГРАММА.

Да воскреснетъ Бѣхъ, и расточатъся врази Егѡ, и да бѣжатъ ѿ лица Егѡ ненавидящїи Егѡ. Яко исчезаетъ дымъ, да исчезнутъ: яко таетъ воскъ ѿ лица Огня, такъ да погибнутъ грѣшницы ѿ лица Бѣихъ. Псаломъ Давида 33.

И минувшей субботѣ, Марїа Магдалина и Марїа Іаковла и Саломїа купили ароматы, да пришедше помажутъ Іиса. И сѣла завтра во едину ѿ субботъ прїидоша на гробъ, возсѣвъ солнцу. И глаголаху къ себѣ: кто ѡвалитъ намъ камень ѿ двери гроба; И возрѣвъше, видѣша, яко ѡваленъ бѣ камень: бѣ же велиїи сѣла. И кшедше во гробъ, видѣша юношу сѣдѣща въ десныхъ, ѡдѣана во сѣдежа бѣла: и оужасашася. Онъ же глагола имъ: не оужасайтеся. Іиса ищите Назарянина распятаго: воста. Евангелїе ѿ Марка, гл. 16.

И облетѣла благодатная вѣсть весь міръ; и побѣжали отъ лица Его ненавидящїе Его, исчезая, яко исчезаетъ дымъ.

„Христосъ воскресъ изъ мертвыхъ!“, поютъ Ангельскїе сонмы на небесахъ съ Херувимами и Серафимами.

„Христосъ воскресъ изъ мертвыхъ!“, поютъ священнослужители въ православныхъ храмахъ, при дымѣ кадильномъ, при сіяніи безчисленныхъ свѣчей и звонѣ колокольномъ.

## PROGRAMME.

Que Dieu Se lève, et que Ses ennemis se dispersent, et que ceux qui Le haïssent s'enfuient de devant Sa face. Qu'ils disparaissent comme disparaît la fumée: et comme la cire se fond au feu, que les pécheurs périssent de même devant la face de Dieu.

LXVII Psaume, d'après la traduction des Septante, adoptée par l'Eglise Russe.

Et lorsque le sabbat fut passé, Marie Madeleine, et Marie mère de Jacques, et Salomé achetèrent des parfums pour venir embaumer Jésus. Et parties de grand matin le premier jour après le sabbat, elles arrivèrent au sépulcre le soleil étant déjà levé. Et elles disaient entre elles: «Qui nous ôtera la pierre de l'entrée du sépulcre?» Et, en regardant, elles virent la pierre ôtée; or elle était fort grande. Et, entrant dans le sépulcre, elles virent un jeune homme assis à droite, vêtu d'une robe blanche, et elles furent stupéfaites. Il leur dit: «N'avez pas peur. Vous cherchez Jésus de Nazareth, Qui a été crucifié; Il est ressuscité».

Evangile d'après St. Marc, chapitre XVI.

Et la joyeuse nouvelle se répandit par tout l'univers, et ceux qui Le haïssaient s'enfuirent de devant Lui, disparaissant comme la fumée.

«Resurrexit!» chantent les chœurs d'AnGES dans le ciel, au son des trompettes des Archanges et au bruissement des ailes des Seraphins. «Resurrexit!» chantent les prêtres dans les temples, au milieu des nuées d'encens, à la lumière des cierges innombrables, au carillon des cloches triomphantes.

Droits d'exécution réservés.

3

# Ouverture

## „La grande Pâque Russe.“

Lento mystico. M.M.  $\text{♩} = 84$ .N. Rimsky-Korsakow, Op. 36.  
(1888.)

I. II. 3 Flauti. *p* *dim. e smorz.*

III. (poi Fl piccolo.) *p* *dim. e smorz.*

2 Oboi. *p* *dim. e smorz.*

2 Clarinetti in C. *p* *dim. e smorz.*

2 Fagotti. *p* *dim. e smorz.*

4 Corni in F. *dim. e smorz.*

2 Trombe. *dim. e smorz.*

3 Tromboni. *dim. e smorz.*

Tuba *dim. e smorz.*

3 Timpani in A.D.G. *dim. e smorz.*

Campanelli. (Glockenspiel.) *dim. e smorz.*

Triangolo. *dim. e smorz.*

Piatti. *dim. e smorz.*

Cassa. *dim. e smorz.*

Tamtam. *dim. e smorz.*

Arpa. *dim. e smorz.*

Violini I. (20-12.) *dim. e smorz.*

Violini II. (18-10.) *dim. e smorz.*

Viole. (14-8.) *dim. e smorz.*

Violoncelli. (12-8.) *dim. e smorz.*

Contra-Bassi. (10-6.) *dim. e smorz.*

*f* *dim.*

Lento mystico. M.M.  $\text{♩} = 84$ .

M. P. Belaieff, Leipzig.

# **VISUAL EXHIBIT B**

*From: "Mary Poppins"*

## **Chim Chim Cher-ee**

*from Walt Disney's Mary Poppins*

by

RICHARD M. SHERMAN and ROBERT B. SHERMAN

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FROM WALT DISNEY'S MARY POPPINS

**CHIM CHIM CHER-EE**WORDS AND MUSIC BY  
RICHARD M. SHERMAN  
AND ROBERT B. SHERMAN

LIGHTLY, WITH GUSTO

CM G+ CM7 F Fm

CHIM CHIM-IN-EY, CHIM CHIM-IN-EY, CHIM CHIM CHER-EE! A SWEEP IS AS

6 CM D7 G7 CM G+ CM7

LUCK-Y, AS LUCK-Y CAN BE. CHIM CHIM-IN-EY, CHIM CHIM-IN-EY, CHIM CHIM CHER -

12 F Fm CM G7 CM Fm

OO! GOOD LUCK WILL RUB OFF WHEN I SHAKES 'ANDS WITH YOU, OR BLOW ME A

18 CM G7 CM G7 CM G7

KISS AND THAT'S LUCK-Y, TOO. (INSTRUMENTAL)

24 CM G+ CM7 F Fm

{ NOW, AS THE LAD-DER OF LIFE 'AS BEEN STRUNG, YOU MAY THINK A  
I CHOOSE ME BRIS-TLES WITH PRIDE, YES, I DO: A BROOM FOR THE

29 CM D7 G7 CM G+ CM7

SWEEP'S ON THE BOT-TOM-MOST RUNG. THOUGH I SPENDS ME TIME IN THE ASH-ES AND  
SHAFT AND A BRUSH FOR THE FLUE. THOUGH I'M COV-ERED WITH SOOT FROM ME 'EAD TO ME

35 F Fm CM G7 1. CM 2. CM

SMOKE, IN THIS 'OLE WIDE WORLD THERE'S NO 'AP-PI-ER BLOKE. GOES.  
TOES, A SWEEP KNOWS 'E'S WEL - COME WHER - EV-ER 'E

2

41 G+ CM7 F Fm

UP WHERE THE SMOKE IS ALL BILL-ERED AND CURLED, 'TWEEN PAVE-MENT AND

46 CM D7 G7 CM G+ CM7

STAR, IS THE CHIM-NEY SWEEP WORLD. WHEN THERE'S 'ARD-LY NO DAY NOR 'ARD-LY NO

52 F Fm CM G7 CM

NIGHT, THERE'S THINGS 'ALF IN SHAD-OW AND 'ALF - WAY IN LIGHT. ON THE

57 Fm CM G7 CM G+

ROOF-TOPS OF LON-DON, COO, WHAT A SIGHT! CHIM CHIM-IN-EY, CHIM CHIM-IN-EY,

63 CM7 F Fm CM D7 G7

CHIM CHIM CHER-EE! WHEN YOU'RE WITH A SWEEP YOU'RE IN GLAD COM-PA - NY.

69 CM G+ CM7 F Fm CM

NO-WHERE IS THERE A MORE 'AP - PI - ER CREW THAN THEM WOT SINGS, "CHIM CHIM CHER-

75 G7 CM Fm CM G7 CM

EE, CHIM CHER-OO!" CHIM CHIM-IN-EY, CHIM CHIM, CHER - EE, CHIM CHER - OO!

# **VISUAL EXHIBIT C**

*From: "Fiddler on the Roof"*

## **Sunrise, Sunset**

*From the Broadway Musical "Fiddler on the Roof"*

by

JERRY BOCK

Lyrics by: SHELDON HARNICK

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Faber Music

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## FROM THE BROADWAY MUSICAL "FIDDLER ON THE ROOF"

**SUNRISE, SUNSET**LYRICS BY  
SHELDON HARNICKMUSIC BY  
JERRY BOCK

MODERATELY SLOW WALTZ TEMPO



1. IS THIS THE LIT-TLE GIRL I CAR - RIED? IS THIS THE LIT-TLE BOY AT  
 2. NOW IS THE LIT-TLE BOY A BRIDE - GROOM, NOW IS THE LIT-TLE GIRL A



PLAY? I DON'T RE - MEM-BER GROW-ING OLD - ER.  
 BRIDE. UN - DER THE CAN - O - PY I SEE THEM,



WHEN DID THEY? \_\_\_\_\_ WHEN DID SHE GET TO BE A  
 SIDE BY SIDE. \_\_\_\_\_ PLACE THE GOLD RING A-ROUND HER



BEAU - TY? WHEN DID HE GROW TO BE SO TALL? WAS-N'T IT  
 FIN - GER, SHARE THE SWEET WINE AND BREAK THE GLASS; SOON THE FULL



YES-TER-DAY WHEN THEY WERE SMALL? \_\_\_\_\_ }  
 CIR-CLE WILL HAVE COME TO PASS. \_\_\_\_\_ }

2

## CHORUS:

GM CM6 GM D7 GM CM6 GM D7 GM CM6

SUN - RISE, \_\_\_ SUN - SET, SUN - RISE, \_\_\_ SUN - SET, SWIFT - LY \_\_\_

GM CM6 GM G7 CM7 F7 B $\flat$ MAJ7

\_\_\_ FLOW THE DAYS; \_\_\_ SEED-LINGS TURN O-VER-NIGHT TO SUN -

B $\flat$ 6 Am7 D7 GM

FLOW'RS, BLOS - SOM - ING E - VEN AS WE GAZE. \_\_\_

GM CM6 GM D7 GM CM6 GM D7 GM CM6

SUN - RISE, \_\_\_ SUN - SET, SUN - RISE, \_\_\_ SUN - SET, SWIFT - LY \_\_\_

GM CM6 GM G7 CM6 D7 $\flat$ 9 GM C7

\_\_\_ FLY THE YEARS; \_\_\_ ONE SEA-SON FOL-LOW-ING AN - OTH - ER,

CM6 D7 D7 $\sharp$ 5 1. GM 2. GM

LAD-DEN WITH HAP-PI-NESS AND TEARS. \_\_\_ TEARS. \_\_\_

## Initial Ferrara Report (2016)

(plaintiff's expert)

**DRAFT: PRIVILEGED AND CONFIDENTIAL WORK PRODUCT**

**LAWRENCE FERRARA, Ph.D.  
FOR: LAWRENCE FERRARA, INC.**

**PRELIMINARY REPORT REGARDING**

**The Musical Compositions in**

**“Emmanuel” written by Vince Ambrosetti**

**And**

**“Christ, Be Our Light” written by Bernadette Farrell**

**I. INTRODUCTION**

1. My rank at New York University is Professor of Music, and my title is Director Emeritus of all studies (B.M. through Ph.D.) in Music and the Performing Arts in New York University’s Steinhardt School. I have written and co-written published books and articles (in peer-reviewed journals) regarding music analysis, methodologies in music research, and other scholarly areas related to music. I currently sit on editorial boards of peer-reviewed journals. I have provided analyses and opinions in connection with music copyright issues for more than 20 years. My *curriculum vitae* is available upon request.

2. I have been asked to complete a comparative musicological analysis of the musical compositions in “Emmanuel” written by Vince Ambrosetti (© 1980) and “Christ, Be Our Light” written by Bernadette Farrell (© 1993 and hereafter “Christ”). The purposes of my analysis are to ascertain (1) whether or not there is objective musicological evidence of copied expression in “Christ” from “Emmanuel”, (2) whether or not the aggregate of similarities between “Christ” and “Emmanuel” are significant, and/or (3) whether or not the aggregate of similarities between these two compositions was in use prior to 1980, the copyright year of “Emmanuel”.

3. A copy of the “Emmanuel” published sheet music is attached as Visual Exhibit A. A copy of the “Christ” published sheet music is attached as Visual Exhibit B.

4. Herein, I summarize the key points of my findings. This preliminary report does not represent a full report of my complete findings.

## **II. FINDINGS**

5. The overall structure of “Emmanuel” and “Christ” is a Verse/Refrain form. The Verse in both compositions is sixteen bars<sup>1</sup> in length. The melodies at issue are (1) in the Verses in “Emmanuel” and “Christ”, and (2) in the Refrain in “Emmanuel”. In “Emmanuel”, the melody in bars 9 – 16 of the Verse is varied and is the basis of the Refrain in “Emmanuel”. Therefore, the music in the Refrain of “Emmanuel” is also at issue. On the other hand, the melody in the Refrain of “Christ” is distinct from melody in the Verse of “Christ”. Therefore, the music in the Refrain of “Christ” is not at issue.

6. As demonstrated in Visual Exhibits A and B referenced above and attached to this report, the Verses in “Emmanuel” and “Christ” are in the key of E minor.<sup>2</sup> In addition, “Emmanuel” and “Christ” are both in 3/4 meter, i.e., each bar (or “measure”) consists of three quarter note beats.

7. The melodic phrase structure in the Verses in “Emmanuel” and “Christ” is the same, namely, melodic phrases consisting of four-bars each. The main similarities are in bars 1-12 in the Verses of both compositions.

### The melodies in bars 1-4 in the Verses

8. Based on the melodies in the published sheet music of both works, Musical Example 1 immediately below is a comparative transcription of the melodies in bars 1-4 in the Verses, wherein the melody in bars 1-4 in “Emmanuel” is placed over the

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<sup>1</sup> A “bar” (also termed a “measure”) is a unit of musical time.

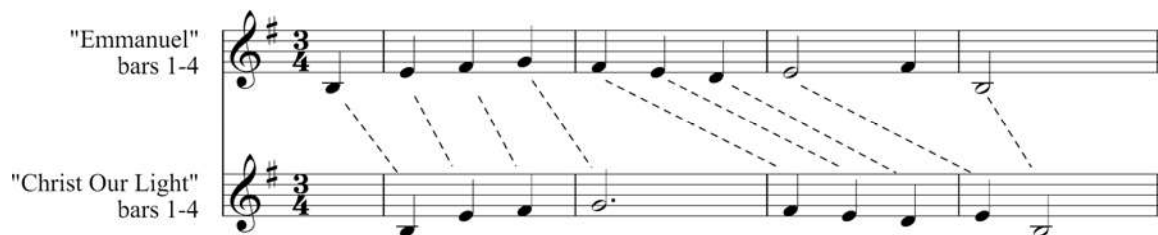
<sup>2</sup> While the Refrain in “Emmanuel” maintains the Verse key of E minor, the Refrain in “Christ” changes to G major.

melody in bars 1-4 in “Christ”. Dotted lines connect identical pitches within the overall sequence (or order) of pitches in both melodies.

### MUSICAL EXAMPLE 1

#### “Emmanuel” / “Christ, Be Our Light”

Bars 1-4 in the Verses



8. Pitches in a melody can be identified by their scale degrees.<sup>3</sup> The scale degrees in the pitch sequences in bars 1-4 in the Verses of “Emmanuel” and “Christ” are charted immediately below. In order to facilitate the reading of the chart below, identical pitches are in **bold** and the final pitch (scale degree 5) is in *italics*.

“Emmanuel”:        **5** **1** **2** **3** **2** **1** **7** **1** *2* *5*

“Christ”:            **5** **1** **2** **3** **2** **1** **7** **1** *5*

9. As transcribed and charted above, the first 8 (out of a total of 9) pitches in “Christ” are identical to the first 8 pitches in “Emmanuel”. Scale degree “5” is the lowest pitch in both melodies, and starts and ends both melodies. Scale degree “5” leaps up to scale degree 1 at the start of both melodies. Moreover, the highest pitch in both melodies is on scale degree “3”. Thus in addition to eight identical pitches, both

<sup>3</sup> As noted above, the Verses in “Emmanuel” and “Christ” are in the key of E minor. There are seven scale degrees in an E natural minor scale: the pitch “e” is scale degree 1, the pitch f-sharp is scale degree 2, the pitch “g” is scale degree 3, the pitch “a” is scale degree 4, the pitch “b” is scale degree 5, the pitch “c” is scale degree 6, and the pitch “d” is scale degree 7.

melodies start and end on the same lowest pitch (scale degree “5”), and reach their highest pitch in exactly the same sequence to scale degree “3”.

10. As illustrated in Musical Example 1 above, the melody in “Emmanuel” begins one beat earlier than the melody in “Christ”. Thus, the metrical placement (*i.e.*, the placement on beats within a bar) is not the same. On the other hand, the rhythmic durations of 7 out of the total of 9 pitches are identical to the rhythmic durations of corresponding identical pitches connected by dotted lines in Musical Example 1 above.

#### The melodies in bars 5-8 in the Verses

11. Now turning to the melodies in bars 5-8 in the Verses in “Emmanuel” and “Christ”, based on the melodies in the published sheet music of both works, Musical Example 2 immediately below consists of the Verse melody in bars 5-8 in “Emmanuel” placed over the Verse melody in bars 5-8 in “Christ”. Dotted lines connect identical pitches within the overall sequence of pitches in both melodies.

### MUSICAL EXAMPLE 2

#### “Emmanuel” / “Christ, Be Our Light”

##### Bars 5-8 in the Verses

The image displays two musical staves in 3/4 time, both with a key signature of one sharp (F#). The top staff is labeled '"Emmanuel" bars 5-8' and the bottom staff is labeled '"Christ Our Light" bars 5-8'. Dashed lines connect corresponding notes between the two staves, illustrating identical pitches. In the 'Emmanuel' melody, the notes in bars 5, 6, 7, and 8 are G4, A4, B4, and C5, with a final whole note G4 in bar 8. In the 'Christ Our Light' melody, the notes in bars 5, 6, 7, and 8 are G4, A4, B4, and C5, with a final whole note G4 in bar 8. The notes G4, A4, B4, and C5 are highlighted in bold in the original image to facilitate reading.

12. The scale degrees in the pitch sequences in the melodies in bars 5-8 in the Verses of “Emmanuel” and “Christ” are charted immediately below. Identical corresponding pitches are highlighted in **bold** to facilitate the reading of the chart.

“Emmanuel”:        5   1   2   3   4   3   2   1  
 “Christ”:           5   1   2   3   4   2   7   1

13. As charted immediately above, 6 out of a total of 8 pitches in “Emmanuel” and “Christ” are identical in pitch sequence. Scale degree “5” is the lowest pitch in both melodies, and both melodies end on scale degree “1”. Scale degree “5” leaps up to scale degree 1 at the start of both melodies. Moreover, the highest pitch in both melodies is on scale degree “4”. Thus, in addition to 6 identical pitches, both melodies (1) start on scale degree “5” which leaps to scale degree 1, (2) end on scale degree “1”, and (3) reach their highest pitch in exactly the same pitch sequence to scale degree “4”.

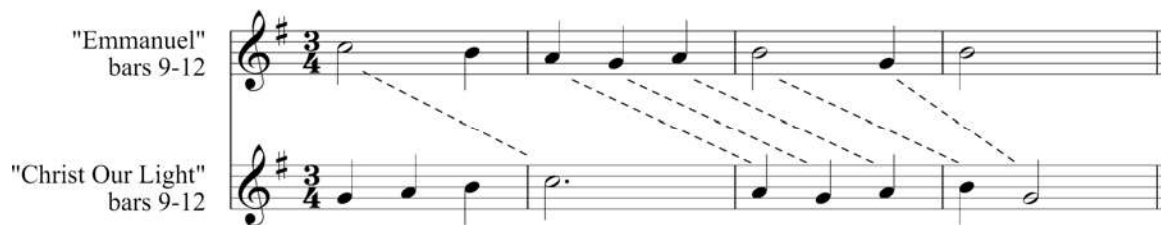
14. As illustrated in Musical Example 2 above, the melody in “Emmanuel” begins one beat earlier than the melody in “Christ”. Thus, the metrical placement is not the same. On the other hand, the rhythmic durations in 5 out of the total of 8 pitches is identical to the rhythmic durations in corresponding identical pitches as connected by dotted lines in Musical Example 1 above. In addition, the rhythmic duration of the final pitch is long in both: a dotted half note held over to a half note in “Emmanuel” and a dotted half note in “Christ”.

#### The melodies in bars 9-12 in the Verses

15. Now turning to the melodies in bars 9-12 in the Verses, based on the melodies in the published sheet music of both works, Musical Example 3 below is a comparative transcription of the melodies in bars 9-12 in the Verses, wherein the melody in bars 9-12 in “Emmanuel” is placed over the melody in bars 9-12 in “Christ”. Dotted lines connect identical pitches within the overall sequence of pitches in both melodies.

**MUSICAL EXAMPLE 3****“Emmanuel” / “Christ, Be Our Light”**

Bars 9-12 in the Verses



16. The scale degrees in the pitch sequences in bars 9-12 in the Verses of “Emmanuel” and “Christ” are charted immediately below.

“Emmanuel”:	6	5	4	3	4	5	3	5
“Christ”:	3	4	5	6	4	3	4	5

17. As charted immediately above, only 2 pitches appear to line up. However, as illustrated with dotted connecting lines in Musical Example 3, the last 5 pitches in “Christ” are identical in pitch sequence with corresponding pitches in “Emmanuel”. Moreover, the highest pitch in both melodies is on scale degree “6”. Thus, in terms of highest pitches, the development of the melody in the Verses in bars 1-12 in “Emmanuel” and “Christ” is the same: the highest pitch in the first 4-bar melodic phrase (bars 1-4) is on scale degree “3”, the highest pitch in the second 4-bar melodic phrase (bars 5-8) is on scale degree “4”, and the highest pitch in the third 4-bar melodic phrase (bars 9-12) is on scale degree “6”. In addition, as analyzed above, the lowest pitches in the first two 4-bar melodic phrases is the same, and the first and last pitches in the first two 4-bar melodic phrases are the same.

18. As illustrated in Musical Example 3 above, while the melody in “Christ” has three opening pitches that do not correspond to pitches in the opening of “Emmanuel”, starting on the high pitch in both 4-bar melodies (on scale degree “6”), the pitch sequences of the melodies line up almost identically. In addition, the metrical placement of five of the last six pitches in “Christ” is the same as in corresponding pitches connected by dotted lines in “Emmanuel”. The rhythmic durations in 3 out of the last 5 pitches in “Christ” are identical to the rhythmic durations in corresponding identical pitches connected by dotted lines.

19. In summary, the *aggregate* of melodic similarities in bars 1-12 in the Verses in “Emmanuel” and “Christ” constitutes a significant amount of musical expression, and provides strong objective musicological evidence of copying.

### **PRIOR ART**

20. In order to provide an opinion as to whether or not the *aggregate* of melodic similarities analyzed above between “Emmanuel” and “Christ” were in use prior to 1980 (the copyright year of “Emmanuel”), I completed a preliminary prior art search.<sup>4</sup> On the basis of my preliminary prior art search, I did not find any musical work that embodies the *aggregate* of melodic similarities objectively found in “Emmanuel” and “Christ”. While I found compositions that embody the 5, 1, 2, 3, 2, 1, 7, 1 pitch sequence, i.e., the first 6 pitches in bars 1-4 in “Emmanuel” and “Christ”, I did not find any compositions that embody the *aggregate* of melodic similarities in bars 1-12, including the melodic development of high notes respectively on scale degrees “3”, “4”, and “6” in each of the three 4-bar melodic phrases at issue.

## **II. CONCLUSIONS**

21. On the basis of my analysis, I found that the *aggregate* of melodic similarities between “Emmanuel” and “Christ” constitutes a significant amount of expression, and provides strong objective musicological evidence of copying.

---

<sup>4</sup> “Prior art” in this report are musical compositions that predate 1980.

22. On the basis of a search for prior art, I did not find any prior art work that embodies the *aggregate* of melodic similarities shared by “Emmanuel” and “Christ”.

23. Therefore, it is my professional opinion that there is strong musicological support for a claim that the musical composition in “Christ” copies “protectable” expression in “Emmanuel”.

Respectfully submitted,

# **VISUAL EXHIBIT A**

ADVENT

000

## Emmanuel



1. A vir - gin shall bring forth a first - born  
2. Un - to you this day shall be born a  
3. A child who was born of such low - ly  
4. All na - tions stand read - y to greet His



son, con - ceived by the Spir - it of God.  
king, the light for a world full of dark.  
state, wrapped on - ly in swad - dling clothes.  
face, a vig - il we keep for His birth.



He shall save all His peo - ple, and  
He shall be our sal - va - tion, and  
Kings shall pause to be - hold His sight, all  
He shall be filled with wis - dom, and



die, our ran - som for sin.  
so His name shall be Je - sus.  
knees shall bend at His name.  
reign His peo - ple with love.

Refrain



Em - man - u - el, Em - man - u - el,



come and live in our midst; Em - man - u - el, Em -



man - u - el, come make Your home in our hearts.

Text: Matthew 1:18-25, Isaiah 9:1-6, Luke 2:1-20; Vince Ambrosetti, b.1956  
Music: Vince Ambrosetti, b.1956  
© 1980, International Liturgy Publications

# **VISUAL EXHIBIT B**

LIGHT

000

## Christ Be Our Light

Verses



1. Long - ing for light, we wait in dark - ness.  
 2. Long - ing for peace, our world is trou - bled.  
 3. Long - ing for food, man - y are hun - gry.

4. Long - ing for shel-ter, man - y are home - less.  
 5. Man - y the gifts, man - y the peo - ple,

\*1. This is the night of new be - gin - nings.

\*2. This is the night Christ our Re - deem - er

\*3. Now will the fire kin - dled in dark - ness

\*4. Sing of the hope deep - er than dy - ing.

\*5. In - to this world morn - ing is break - ing.



Long - ing for truth, we turn to You.  
 Long - ing for hope, man - y de - spair.  
 Long - ing for wa - ter, man - y still thirst.

Long - ing for warmth, man - y are cold.  
 man - y the hearts that yearn to be - long.

This is the night when heav - en meets earth.  
 rose from the grave tri - um - phant and free,  
 burn to dis - pel the shad - ows of night.

Sing of the power strong - er than death.  
 All of God's peo - ple, lift up your voice.



Make us Your own, Your ho - ly peo - ple,  
 Your word a - lone has power to save us.  
 Make us Your bread, bro - ken for oth - ers,

Make us Your build - ing, shel - ter - ing oth - ers,  
 Let us be ser - vants to one an - oth - er,

This is the night filled with God's glo - ry,  
 leav - ing the tomb of e - vil and dark-ness,  
 Star of the Morn - ing, Je - sus our Sav - ior,

Sing of the love end - less as heav - en,  
 Cry out with joy, tell out the sto - ry,

\*Easter Vigil verses

## LIGHT



light for the world to see.  
Make us Your liv - ing voice.  
shared un - til all are fed.  
walls made of liv - ing stone.  
mak - ing Your king - dom come.  
prom - ise of our new birth!  
emp - ty for all to see.  
You are the world's true light!  
dawn - ing through - out the earth.  
all of the earth re - joice.

## Refrain



Christ, be our light! Shine in our hearts.



Shine through the dark - ness. Christ, be our light!



Shine in Your Church gath - ered to - day.

Text: Bernadette Farrell, b.1957

Music: Bernadette Farrell, b.1957

© 1993, 2000, Bernadette Farrell. Published by OCP Publications

Ferrara Rebuttal Report  
dated September 29, 2021  
(plaintiff's expert)

LAWRENCE FERRARA, Ph.D.  
FOR: LAWRENCE FERRARA, INC.

**REBUTTAL TO THE JUDITH FINELL REPORT**  
**REGARDING “EMMANUEL” AND “CHRIST, BE OUR LIGHT”**

**I. INTRODUCTION: THE PRELIMINARY REPORT**

1. I was initially retained in this matter in 2016 by Mr. Barry Slotnick of Loeb & Loeb, attorney for Mr. Vincent A. Ambrosetti. In November of 2016, I completed a “Preliminary Report” regarding “Emmanuel” written by Vincent A. Ambrosetti and a work written by Bernadette Farrell called “Christ Be Our Light” (hereafter, “Christ”). I had no communication regarding this matter between November 2016 and August 2021. In August of 2021, I was contacted by Plaintiff’s attorney, Donald J. Schmid, who asked to retain my services. A copy of my 2016 “Preliminary Report” is attached hereto as **Rebuttal Report Visual Exhibit A**.

2. In August 2021, I was informed by Mr. Schmid that he had previously exchanged my 2016 “Preliminary Report” with Defendant’s counsel. As a preliminary report initially written for internal purposes, it did not include my cv or disclosures as to my fee structure and record of giving testimony. My cv, including Rule 26-related disclosures, is attached hereto as **Rebuttal Report Appendix 1**.

3. I have reviewed my 2016 “Preliminary Report” (hereafter “the Ferrara Preliminary Report”) and I stand by and agree with the analysis therein. However, as noted in Paragraph 4 therein, it “does not represent a full report of my complete findings”. In addition, I would replace the word “protectable” in the final Paragraph 23, cited immediately below.

Therefore, it is my professional opinion that there is strong musicological support for a claim that the musical composition in “Christ” copies “protectable” expression in “Emmanuel”. [Finell Report, ¶23, p. 8]

In 2016, I was asked whether, from a musicological perspective, “Christ” copied “protectable” expression from “Emmanuel”. The legal meaning of “protectable” expression was explained to me. However, I am aware that only the Court or a jury can find that expression at issue is “protectable” or not. Therefore, had I been given the opportunity to update my 2016 preliminary report, I would have removed the word “protectable” in Paragraph 23 as follows.

It is my professional opinion that there is strong musicological support for a claim that the musical composition in “Christ” copies a significant amount of expression in “Emmanuel”. As noted above, in a preliminary search for prior art I did not find any prior art work that embodies the aggregate of similarities at issue.

## **II. INTRODUCTION TO THE REBUTTAL OF THE FINELL REPORT**

4. In August 2021, Plaintiff’s counsel provided me with a copy of a report dated July 27, 2021 by Judith Finell which includes an affirmative report and a rebuttal of the Ferrara Preliminary Report (hereafter, “the Finell Report”). The Finell Report has not changed my opinions as presented in the Ferrara Preliminary Report. It continues to be my opinion that there is strong musicological support for a claim that the musical composition in “Christ” copies a significant amount of expression in “Emmanuel” and that no prior art work has been found that embodies the aggregate of similarities at issue. Having assessed the Finell Report and the prior art proffered therein, it is my professional opinion that the similarities that are shared by “Emmanuel” and “Christ” strongly support a claim of the copying of a significant amount of expression, the aggregate of which does not exist in any prior art work proffered in the Finell Report. Notably, the most substantive similarity is found in respective 26-note melodies that span three consecutive melodic phrases in bars 1-12 of the Verses of “Emmanuel” and “Christ”. This very significant similarity in melodic expression that is shared in “Emmanuel” and “Christ” is absent in each and every prior art work proffered in the Finell Report. In addition, as shown below, none of the prior art works in the Finell Report remotely embodies the aggregate of 23 similarities shared by “Emmanuel” and “Christ”.

5. As explained more fully below, the affirmative sections of the Finell Report (Parts 1 and 2) fail because they:

- Present a misleading, flawed, incomplete, and self-contradictory analysis of the melodies in “Emmanuel” and “Christ”;
- Do not provide any analysis of the harmonies (chords are merely listed in a Table) and present only one possible use of chords in “Emmanuel” and “Christ”;
- Are mistaken and self-contradictory in the analysis of structure;
- Present misleading, flawed, incomplete, and self-contradictory analyses of prior art;
- Present prior art that falls far short of the melodic similarities at issue and embodied in “Emmanuel” and “Christ”;
- Omit substantial portions of melodies in prior art; and
- Proffer analytical findings that are objectively refuted by the Finell Report’s own transcriptions.

6. As explained more fully below, the Rebuttal section of the Finell Report (Part 3) fails because it:

- Misleads, mischaracterizes, and misrepresents the analysis of “Emmanuel” and “Christ” in the Ferrara Preliminary Report;
- Misleads, mischaracterizes, and misrepresents the presentation of a preliminary prior art search in the Ferrara Preliminary Report;
- Contradicts its own focus on what it terms “crucial intervening pitches” in “Emmanuel” and “Christ” in its Part 3 rebuttal of the Ferrara Preliminary Report by completely omitting the analysis of “intervening pitches” in its entire Part 2 on prior art;
- Obscures and conflates “fundamental musical building blocks” with significant similarities in melodic expression shared by “Emmanuel” and “Christ”; and

- Proffers analytical findings regarding the Ferrara Preliminary Report that are objectively refuted by transcriptions and/or comparative charts in the Ferrara Preliminary Report and by its own transcriptions and comparative charts.

## **II. A. THE FINELL REPORT: “PART 1”, “EMMANUEL” AND “CHRIST”**

7. The Finell Report is divided into 4 parts:

- “Part 1” (pages 1-11) consists of a comparison of “Emmanuel” and “Christ”;
- “Part 2” (pages 12-29) consists of the presentation of prior art;
- “Part 3” (pages 30-39) consists of a rebuttal of the Ferrara Preliminary Report, and
- “Part 4” (page 40) consists of a summary of conclusions.

8. The following is a rebuttal of Part 1 of the Finell Report.

### **CONTRARY TO MUSICOLOGICAL SCHOLARSHIP AND PRACTICES, THE FINELL REPORT’S DEFINITION OF “MELODY” OMITTS MELODIC STRUCTURE AND DEVELOPMENT**

9. “Melody” is a single line of music that consists primarily of a succession (i.e., a sequence or order) of pitches and the rhythmic durations of those pitches within a melodic phrase structure.<sup>1</sup> Notably, in the section, “Structure and Design” of its entry on “Melody”, *The New Grove Dictionary of Music and Musicians* explains:

“The character of a given melody is determined by its range or relative position within the total pitch continuum, its ambitus or pitch spread, its contour or linear design, and its syntactic structure with respect to

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<sup>5</sup> See “Melody” in *The New Grove Dictionary of Music and Musicians*, Second Edition, 2001, Volume 16, pp. 363 – 373, and *The Harvard Dictionary of Music*, Fourth Edition, 2003, pp. 499 - 502.

elements of contrast and repetition, variation and **development**". [p. 364, bold font emphasis added]

10. The Finell Report's definition of "melody" omits the importance of melodic structure and development (noted in the 29-Volume *The New Grove Dictionary*) as shown immediately below.

"Melody consists of (a) pitch plus (b) rhythm (duration) within the context of (c) metrical placement. The melodies of 'Emmanuel' and 'Christ' were compared for similarities in pitch, rhythm, and metrical placement based on the sheet music provided." [Finell Report, ¶13, p. 2]

While the Finell Report includes pitch and rhythmic duration, contrary to established musicological scholarship, it considers pitch and rhythmic duration "within the context of metrical placement". As noted in footnote 1 in the Finell Report, "Metrical placement describes the location within a bar in which a particular pitch is sounded." While it is very important to analyze metrical placements of the notes when comparing melodies, the "context" for the analysis of pitch, rhythmic duration, and metrical placement is the *melodic structure* and *melodic development*. The Finell Report obfuscates the significant similarities in the melodic development of the melodies at issue in "Emmanuel" and "Christ" and it misrepresents and/or omits analysis of the melodic structure and development in prior art as shown below.

#### THE FINELL REPORT MISALIGNS CHARTED SCALE DEGREES OBFUSCATINING THE OBJECTIVE SIMILARITIES IN THE PITCHES

11. In Paragraph 4 on Page 2 of the Finell Report, scale degree numbers<sup>2</sup> of pitches are misaligned making it difficult to see otherwise obvious objective similarities.

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<sup>2</sup> Musicologists often analyze and compare melodies based on the scale degrees of the pitches. The E natural minor scale, upon which the melodies in the Verses in "Emmanuel" and "Christ" are based, consists of 7 scale degrees, numbered 1-7 in which the pitch "e" is scale degree 1, the pitch "f#" is scale degree 2, the pitch "g" is scale degree 3, the pitch "a" is scale degree 4, the pitch "b" is scale degree 5, the pitch "c" is scale degree 6, and the pitch "d" is scale degree 7.

When properly aligned, the scale degrees in bars 1-8 are significantly similar as shown below. Using the scale degrees in Paragraph 4 on Page 2 of the Finell Report, the first pitch of each melodic phrase is properly aligned and corresponding pitches that are on the same scale degree are highlighted in red immediately below. (As noted in the Finell Report, intervening differing scale degrees are shown in brackets.)

- a. "Emmanuel" (bars 1-8): **5-1-2-3-2-1-7-1-[2]-5**      **5-1-2-3-4-[3]-[2]-1**
- b. "Christ" (bars 1-8):      **5-1-2-3-2-1-7-1- 5**      **5-1-2-3-4-[2]-[7]-1**

Thus, as charted (but without alignment) in Paragraph 4 of the Finell Report and as more clearly shown above, out of a total of 17 notes in the melody in bars 1-8 of the Verse in "Christ", 15 (88%) share the same scale degrees with (15 out of a total of 18) corresponding notes in "Emmanuel". Without the proper alignment, let alone without red highlights, the misalignment of the scale degrees in the Finell Report can obfuscate the extensive similarity in the pitches in the melodies in bars 1-8 of both songs.

12. In the continuation of Paragraph 4 on Page 3 of the Finell Report, scale degree numbers of pitches are once again misaligned making it difficult to see otherwise obvious objective similarities. When the scale degree numbers are properly aligned, the scale degrees in bars 9-11 of "Emmanuel" and bars 10-12 of "Christ"<sup>3</sup> are almost the same as shown below. Therein, the first pitch is aligned and corresponding pitches that are on the same scale degree are highlighted in red immediately below. (As noted in the Finell Report, intervening differing scale degrees are shown in brackets.)

- a. "Emmanuel" (bars 9-11):      **6-[5]-4-3-4-5-3**
- b. "Christ" (bars 10-12):      **6- 4-3-4-5-3**

Thus, as charted (but without alignment) in Paragraph 4 of the Finell Report and as shown more clearly above, out of a total of 6 notes in the melody in bars 10-12 of the

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<sup>3</sup> The analysis of the melodies in Paragraph 4 of the Finell Report omits one bar in each song, namely bar 12 in "Emmanuel" and bar 9 in "Christ". That omission is proper because it aligns the melodies in bars 9-11 of "Emmanuel" with bars 10-12 in "Christ" to facilitate the comparison and because the respective full 26-note melodies (in all 12 bars) at issue in "Emmanuel" and "Christ" are transcribed in the Finell Report.

Verse in “Christ”, all 6 (100%) share the same scale degrees with (6 out of a total of 7) corresponding notes in bars 9-11 of “Emmanuel”. Without the proper alignment, let alone **red** highlights, the misalignment of the scale degrees in the Finell Report can make it difficult to see the significant similarity in the pitches in the melodies of these 3 respective bars in “Emmanuel” and “Christ”.

13. In summary, as analyzed in the Finell Report, out of a total of 23 notes in bars 1-8 and 10-12 of “Christ”, 21 (91%) share the same scale degrees with (21 out of 25 ) corresponding notes in bars 1-11 of “Emmanuel”. As shown below and in the Finell Report, these bars in each Verse of “Emmanuel” and “Christ” embody the extensive melodic expression at issue in the very long melody in bars 1-12 of both songs and the consecutive and contiguous development of that melodic expression in three melodic phrases, as transcribed in the Finell Report. None of the prior art works in the Finell Report even remotely embody this extensive melodic expression that is developed over three consecutive melodic phrases in 12 bars of both “Emmanuel” and “Christ”.

THE FINELL REPORT OBFUSCATES, IS MISTAKEN, AND IS SELF-CONTRADICTORY IN ITS ANALYSIS OF THE RHYTHMIC DURATIONS IN THE MELODIES AT ISSUE

14. In Paragraphs 5 and 6, the Finell Report presents a scant analysis of the rhythmic durations in the melodies at issue. Not only bare, the Finell Report’s analysis is mistaken and self-contradictory. Paragraphs 4 and 6 of the Finell Report establish that the melodic similarities at issue are in bars 1-12 of “Emmanuel” and “Christ”. This is confirmed in Musical Example 3 (on Page 13 in Part 2) of the Finell Report in which 3 corresponding, consecutive melodic phrases in the Verses of “Emmanuel” and “Christ” (respectively in bars 1-4, 5-8, and 9-12) are identified and transcribed forming a very long melody in each song that spans three consecutive melodic phrases in 12 bars.

15. In Paragraph 6, the Finell Report concedes that 21 (out of a total of 26 notes) in the melody in bars 1-12 of “Christ” (80.7%) share the same scale degrees with corresponding notes in the melody in bars 1-12 of “Emmanuel”. However, in Paragraph 6(b), the Finell Report is demonstrably mistaken in its analysis of the notes in

“Emmanuel” and “Christ” with the same scale degree and rhythmic duration, namely, in its finding that “7 out of 21 [notes with similar scale degrees] have the same scale degree and duration...” *As transcribed in Musical Example 2 in the Finell Report*, the following **13** (not 7) notes in “Christ” have the same scale degrees and the same rhythmic durations as in “Emmanuel”:

- Quarter notes on scale degrees **5-1-2** in bar 1 of “Christ”;
- Quarter notes on scale degrees **2-1-7** in bar 3 of “Christ”;
- Quarter notes on scale degrees **5-1-2** in bar 5 of “Christ”;
- Quarter note on scale degree **4** in bar 7 of “Christ”, and
- Quarter notes on scale degrees **4-3-4** in bar 11 of “Christ”.

Thus, the analysis in Paragraph 6(b) of the Finell Report is demonstrably mistaken and self-contradictory to its own transcription in Musical Example 2 on Page 5. In fact, almost twice as many notes (13, not 7) have the same scale degrees and the same rhythmic durations in the bars in “Emmanuel” and “Christ” as transcribed in the Finell Report and as written in the published sheet music.<sup>4</sup>

16. Using the notes and scale degrees *as transcribed in Musical Example 2 in the Finell Report*, Rebuttal Report Musical Example 1 immediately below shows, with **red** highlighted note heads, that 21 out of a total of 26 notes in bars 1-12 of “Christ” share the same scale degrees with corresponding notes in “Emmanuel”. As shown in Musical Example 2 in the Finell Report (but mistakenly analyzed in Paragraph 6(b) of that report) and as shown immediately above and in Rebuttal Report Musical Example 1 below, 13 of those 21 notes also have the same scale degrees and the same rhythmic durations in these bars in “Emmanuel” and “Christ”.

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<sup>4</sup> A copy of published sheet music of “Emmanuel” is included in the Ferrara Preliminary Report as Visual Exhibit A. A copy of published sheet music of “Christ” is included in the Ferrara Preliminary Report as Visual Exhibit B. As noted above, the Ferrara Preliminary Report is attached as **Rebuttal Report Visual Exhibit A**.

# REBUTTAL REPORT MUSICAL EXAMPLE 1

As transcribed in Musical Example 2 of the Finell Report

Bars 1-12 of the Verse in “Emmanuel” and “Christ”

**Red** highlighted note heads are added to facilitate the comparison

The image displays two staves of musical notation in 3/4 time, with a key signature of one sharp (F#). The top staff is labeled "Emmanuel" and the bottom staff is labeled "Christ". Both staves show bars 1 through 12. Fingerings are indicated by numbers 1-5 above the notes. Red note heads are added to specific notes in both staves to facilitate comparison. The "Emmanuel" staff starts with a red note head on the first beat of bar 1, while the "Christ" staff starts with a red note head on the second beat of bar 1, illustrating a one-beat shift.

THE FINELL REPORT MISSES THE IMPORTANCE OF THE FACT THAT THE MELODY IN “CHRIST” STARTS ONE BEAT LATER THAN THE MELODY IN “EMMANUEL” WHICH CAUSES METRICAL PLACEMENTS OF NOTES TO DIFFER

17. The melody at issue in bars 1-12 of each Verse in “Christ” starts one beat later than the melody at issue in bars 1-12 of each Verse in “Emmanuel”. That shifting of the metrical placement of the starting note by one beat causes many of the notes in the melodies at issue to differ in their metrical placements. The Finell Report barely acknowledges this important fact. The analysis of the metrical placements of notes in melodies is of critical importance. However, when objective musical evidence of copying is clearly established (as it is in this case) and when, in that copying, the metrical placement of the starting note of a melody is changed thereby changing the

metrical placements of the subsequent notes in the melodies at issue, the resultant metrical placements of the notes at issue are much less informative. The shifting of the metrical placement of the starting note by one beat in “Christ” (1) does not mitigate the exceedingly strong evidence of copying even though (2) it causes many of the notes in the melodies at issue to differ in their metrical placements. Starting the melody in “Christ” one beat later than the melody in “Emmanuel” and the resultant differences in metrical placement should not create a cover and an excuse for denying the very strong objective musicological evidence of copying, nor should starting a melody one beat later be allowed to undermine the very significant similarities in the very long 26-note melodies over 12-bars at issue in “Emmanuel” and “Christ”.

18. An example using a familiar melody may clarify this point. In Track 1 of **Rebuttal Report Audio Exhibit 1** attached to this report, the first melodic phrase of “Mary Had a Little Lamb” starts on beat 1. The melody is preceded by 4 quarter note taps establishing one bar in 4/4 meter. On Track 1, this well-known melody is followed by an iteration in which the melody starts one beat later, namely, on beat 2, and is therefore preceded by 5 quarter note taps establishing one bar plus an additional beat in 4/4 meter. Moreover, in the second melodic phrase on Track 1, not only is the metrical placement displaced by one beat, the rhythmic duration of the third note has been extended to 2 beats instead of 1 beat. Thus, in the paired melodies on Track 1, the first iteration of the melody is the opening melodic phrase in “Mary Had a Little Lamb” in its original form and the second iteration the melody (1) starts one beat later causing all of the notes to have different metrical placement and (2) changes the rhythmic duration of the third note. These two melodies are paired 3 times on Track 1. In listening to the paired melodies, it is clear that the second melody (preceded by 5 taps and with the longer rhythmic duration on the third note) copied the traditional melody that precedes it, and that the similarity in the melodies is evident. In summary, Track 1 on **Rebuttal Report Audio Exhibit 1** shows that even when all of the notes in the opening melodic phrase in “Mary Had a Little Lamb” are played with different metrical placements and when the rhythmic duration is changed in one note, copying in the altered melody and the similarity between the two melodies are evident.

THE ANALYSIS OF THE OPENING MELODY IN “JOY TO THE WORLD” AND “FLY ME TO THE MOON” IN THE FINELL REPORT IS UNINFORMATIVE AND MISLEADING

19. In Paragraph 5 and Musical Example 1 on Pages 3-4 of the Finell Report, the analysis of the opening 5 notes in the melodies in “Joy to the World” and “Fly Me to the Moon” is uninformative and misleading. First, not a single corresponding note in the opening melodies in “Joy to the World” and “Fly Me to the Moon” have the same rhythmic duration, as transcribed in the Finell Report. However, as transcribed in Musical Example 2 of the Finell Report and as shown in **Rebuttal Musical Example 1** above, in the opening melodic phrase in the Verse of “Emmanuel” and “Christ”, 7 notes (**5-1-2** in bar 1, **2-1-7** in bar 3, and **5** in bar 4 of “Christ”) have identical pitches and identical rhythmic durations. Thus, as transcribed in the Finell Report, there is a much greater similarity in the rhythmic durations of the opening melodic phrase in “Emmanuel” and “Christ” than in the opening melodic phrase in “Joy to the World” and “Fly Me to the Moon”.

20. Second, as transcribed in Musical Example 1 in the Finell Report, while the meter in “Joy to the World” is 2/4 time (in which there are **2** quarter beats per bar), by way of difference, the meter in “Fly Me to the Moon” is 3/4 time (in which there are **3** quarter note bears per bar). Thus, while the meters are different in “Joy to the World” and “Fly Me to the Moon”, the meter in both “Emmanuel” and “Christ” is the same, as transcribed in the Finell Report. Thus, there is a greater similarity in the meter of the opening melodic phrases in “Emmanuel” and “Christ” than in the meter of the opening melodic phrases in “Joy to the World” and “Fly Me to the Moon”.

21. Third, as transcribed in Musical Example 1 in the Finell Report, the end of the first sub-phrase in the “Joy to the World” melody is on scale degree “5” sung to the word, “world”. The inclusion of scale degree “4” in the Finell Report’s transcription of “Joy to the World” creates a dangling and isolated note sung to the word, “the”. By way of difference, scale degree “4” in “Fly Me to the Moon” is sung to the word, “moon”, in the unbroken opening melodic sub-phrase set to the title lyric, “Fly me to the moon”. Hence, the melodic structure of the opening melody sung to the interruptive **“Joy to the**

**world, // the**” is very different from the melodic structure of the opening melody sung to the uninterrupted title, **“Fly me to the moon”**, *as transcribed in the Finell Report*. On the other hand, as transcribed in the Finell Report and shown below, the respective first melodic phrases in “Emmanuel” and “Christ” are much more similar.

22. In a merely conclusory and demonstrably wrong analysis, at the end of Paragraph 5 in the middle of Page 4, the Finell Report opines:

“The melodies at issue in “Emmanuel” and “Christ” differ even more than do the melodies of “Joy to the World” and “Fly Me to the Moon...”

First, the Finell Report fails to provide a proper comparative analysis of the similarities and differences in the melodies in “Joy to the World” and “Fly Me to the Moon” on the one hand, and “Emmanuel” and “Christ” on the other hand. Second, as shown above and *as transcribed in the Finell Report*, the conclusory opinion in the Finell Report cited immediately above is demonstrably wrong. In fact, as shown above, the melodies at issue in “Emmanuel” and “Christ” are objectively more similar than the melodies in “Joy to the World” and “Fly Me to the Moon”.

#### THE FINELL REPORT’S SECTION ON THE “HARMONIES” FAILS TO PROVIDE ANY ANALYSIS AND PRESENTS ONLY ONE POSSIBLE USE OF CHORDS

23. The opening sentence in Paragraph 1 of the Finell Report states that the published sheet music of “Emmanuel” and “Christ” was “provided” by Mr. Leonard DuBoff. The Finell Report failed to provide copies of that sheet music. Moreover, in footnotes 6-9 on Page 6 regarding “Christ”, the Finell Report refers to “the guitar/vocal version” which suggests that there is a second version of “Christ” that was used and relied upon. The Finell Report failed to provide a copy of this alternative “guitar/vocal version” of “Christ”.

24. One must assume that the “Emmanuel” and “Christ” sheet music upon which the Finell Report relied includes chord symbols that are the basis of the chords listed in Table 1 on Page 6 of the Finell Report. Copies of the published sheet music of “Emmanuel” and “Christ” that I received in 2016 were attached to the Preliminary

Ferrara Report, attached hereto as **Rebuttal Report Visual Exhibit A**. As shown in that attachment, no chords are included in those published versions of “Emmanuel” and “Christ”.

25. First, the Finell Report fails to provide any analysis of the chords (harmonies) in “Emmanuel” and “Christ”. Merely listing the chords in Table 1 (presumably copied from the sheet music that the Finell Report relied upon) is not music analysis. In a single, bare, and conclusory sentence, the harmonic analysis of the chords in the Finell Report consists wholly of the following.

“The chord progressions of “Christ” and “Emmanuel” differ considerably, as shown above”. [Finell Report, ¶9, p. 7]

However, what is “shown above” is merely a listing of chords in Table 1 presumably copied from sheet music that the Finell Report failed to provide. That is not harmonic analysis.

26. Second, the chords that are listed in Table 1 represent only one possible harmonization (use of chords) in “Emmanuel” and “Christ”. Different chords could be used to harmonize the melodies in “Emmanuel” and “Christ” in keeping with harmonization practices.

27. Third, as shown in the Finell Report and above, the melodies at issue are in bars 1-12 in “Emmanuel” and “Christ”. Even using the chord progressions in Table 1 in those bars, harmonic similarities are obvious and notable. For example, the first melodic phrase, bars 1-4, begins with an “Em” (tonic) chord in both songs. The chord progression in that first melodic phrase includes a “D” (subtonic) chord and omits a “B” major (dominant) chord. The second melodic phrase, bars 5-8, begins with an “Em” (tonic) chord and ends with a tonic chord (“Esus4” in “Christ”) in both songs. Bar 6 includes an “Am” (subdominant) chord in both songs. Moreover, the chord progression in the second melodic phrase, like the chord progression in the first melodic phrase, omits a “B” major (dominant) chord. The chord progression in the third melodic phrase, bars 9-12, is less similar but includes “Am” (subdominant) followed by “D” (subtonic) chords and omits a “B” major (dominant) chord. Indeed, nowhere in the entire Verses of

“Emmanuel” and “Christ” is there a “B” major (dominant) chord as presented in Table 1 of the Finell Report. The complete absence of a dominant chord in the entirety of the Verses of both songs is unusual and that omission represents a notable harmonic similarity between the Verses of “Emmanuel” and “Christ”.

28. In summary, the Finell Report (1) failed to provide copies of the published sheet music it relied upon, (2) failed to present any analysis of the chord progressions in “Emmanuel” and “Christ” (merely copying and listing chords in a Table is not analysis), and (3) failed to identify harmonic similarities in the portion of the Verses at issue.

THE FINELL REPORT’S TABLE 2 REGARDING “STRUCTURE” IS MISTAKEN AND SELF-CONTRADICTIONARY

29. Table 2, titled “Structural Comparison”, on Pages 10-11 of the Finell Report is not only incorrect, it is self-contradictory to the analysis on its Page 9. In Paragraphs 15-16 on Page 9, the Finell Report correctly states that each Verse in “Emmanuel” and “Christ” is 16 bars long and consists of 4 melodic phrases of 4 bars each. Thus, as stated in the Finell Report, each Verse in “Emmanuel” and “Christ” consists of Phrase 1 (bars 1-4), Phrase 2, (bars 5-8), Phrase 3, (bars 9-12), and Phrase 4 (bars 13-16). Indeed, on Page 13 of the Finell Report, comparative transcriptions of “Phrase 1” (bars 1-4), “Phrase 2” (bars 5-8), and “Phrase 3” (bars 9-12) in the “Emmanuel” and “Christ” Verses are presented. (A comparative transcription of Phrase 4 in bars 13-16 is not presented because, as noted in the Ferrara Preliminary Report and above, the melody in bars 13-16 in the Verses is not at issue.)

30. While the narrative in Paragraphs 15-16 on Page 9 correctly states that each Verse in “Emmanuel” and “Christ” is 16 bars long and consists of 4 melodic phrases of 4 bars each, in its Table 2, by way of self-contradiction, the Finell Report mistakenly finds that “Verse, phrase 1” is **8** (not 4) bars long (bars 1-8), and “Verse phrase 2” is **8** (not 4) bars long (bars 9-16). Table 2 on Pages 10-11 is not only self-contradictory to the analysis on Page 9, it is mistaken.

31. Table 2 is also marked by confusion with respect to the sources (sheet music) that were relied upon in the Finell Report. As noted above, the Finell Report

failed to provide copies of the “Emmanuel” and “Christ” sheet music it relied upon. An 8-bar “Introduction” section is listed in “Emmanuel” and a 4-bar “Introduction” section is listed in “Christ” in Table 2. However, the published sheet music that I used and attached in the Ferrara Preliminary Report does not include an Introduction in either song. More confusion in the Finell Report is caused by footnote 16 on Page 10 in which the “Introduction” in “Christ” is apparently in a “guitar/vocal version” which appears to be a second unattached musical source of “Christ”.

### THE FINELL REPORT OMITTS ANALYSIS OF THE MELODIC DEVELOPMENT IN THE MELODIES AT ISSUE

32. The analysis of the melodies in “Emmanuel” and “Christ” on Pages 2-5 of the Finell Report fails to show the very strong similarities in the melodic phrase structure and development of the melodies at issue in “Emmanuel” and “Christ”. As noted above, the entry on “Melody” in the 29-volume *Grove Dictionary of Music and Musicians* includes melodic “development”. [Grove, Volume 16, p. 364] The Finell Report avoids the empirically verifiable fact that the melodic phrase structure and melodic development of the very long melody in bars 1-12 in the Verse of “Emmanuel” is exceedingly similar to the corresponding melodic phrase structure and melodic development of the very long melody in bars 1-12 in the Verse of “Christ”. Thus, not only are the corresponding pitches in 21 out of 26 notes the same and the rhythmic durations in 13 out of 26 notes the same *as transcribed in the Finell Report* as shown above and below, the melodic phrase structure and development is exceedingly similar in bars 1-12 of the Verse of “Emmanuel” and “Christ”.

33. Indeed, on Page 13 of the Finell Report, the exceedingly similar melodic phrase structure and melodic development is shown in the respective comparative transcriptions of “Phrase 1” (bars 1-4), “Phrase 2” (bars 5-8), and “Phrase 3” (bars 9-12) in “Emmanuel” and “Christ”. The Finell Report avoids the objective fact that the Verse melody in Phrases 1, 2, and 3 in bars 1-12 of “Emmanuel” and that of “Christ” are consecutively and contiguously developed as a very long continuous melody in an exceedingly similar way. As shown in Musical Example 3 on Page 13 of the Finell

Report<sup>5</sup>, the structure and development of the melodies at issue in Phrase 1, Phrase 2, and Phrase 3 of “Emmanuel” and “Christ” are marked by significant similarities that continue throughout bars 1-12 in both songs. This is shown in Rebuttal Report Musical Example 1 above which is a copy of the transcription in Musical Example 2 of the Finell Report and adds red highlighted note heads to facilitate the comparison. Indeed, as shown later in this rebuttal report, not one prior art work proffered in Part 2 of the Finell Report is even remotely close to sharing the very significant and substantial melodic expression that is developed in an exceedingly similar way over three consecutive melodic phrases in “Emmanuel” and “Christ”.

34. Using the transcriptions of the melodies in the Finell Report, three comparative transcriptions of the melodies in Phrase 1, Phrase 2, and Phrase 3 in Musical Example 3 on Page 13 of the Finell Report are respectively transcribed in Rebuttal Report Musical Examples 2, 3, and 4 below. Corresponding notes with the same scale degrees are highlighted in red. Each comparative transcription is accompanied by an analysis of the similarities between “Emmanuel” and “Christ” as *transcribed in the Finell Report* but very often not included in the narrative analysis in the Finell Report.

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<sup>5</sup> The transcriptions of the melodies in “Emmanuel” and “Christ” in Musical Examples 2 and 3 in the Finell Report are consistent with the published sheet music of “Emmanuel” and “Christ” respectively attached to the Preliminary Ferrara Report which is attached hereto as **Rebuttal Report Visual Exhibit A**.

## REBUTTAL REPORT MUSICAL EXAMPLE 2

### Phrase 1 (as per the published sheet music and the Finell Report)

Notes with the same scale degrees are highlighted in **red**

The image shows two staves of music in 3/4 time, both in the key of D major (one sharp). The top staff is labeled "Emmanuel" and the bottom staff is labeled "Christ". Above each staff, scale degrees are indicated: 5, 1, 2, 3, 2, 1, 7, 1, 2, 5 for "Emmanuel" and 5, 1, 2, 3, 2, 1, 7, 1, 5 for "Christ". Notes with the same scale degrees are highlighted in red. In the "Emmanuel" staff, the notes for scale degrees 1, 2, 3, 2, 1, 7, and 1 are red. In the "Christ" staff, the notes for scale degrees 5, 1, 2, 3, 2, 1, 7, and 1 are red. The notes for scale degree 5 in both staves are the lowest pitch, and the notes for scale degree 3 are the highest pitch.

35. As shown in Rebuttal Report Musical Example 2 immediately above, all 9 notes in Phrase 1 of "Christ" (100%) share the same scale degrees (**5-1-2-3-2-1-7-1-5**) with (9 of the total 10<sup>6</sup>) corresponding notes in "Emmanuel". Moreover, 7 out of those 9 notes in Phrase 1 of "Christ" share the same rhythmic durations (quarter notes in bar 1 on scale degrees **5-1-2** and in bar 3 on scale degrees **2-1-7**, and a half note on scale degree **5**) with corresponding notes in "Emmanuel". Thus, 77.7% of the notes in Phrase 1 of "Christ" share (1) the same scale degrees and (2) the same rhythmic durations with Phrase 1 of "Emmanuel", as per the published sheet music sheet music and as *transcribed in the Finell Report* and copied (with **red** highlighted notes) in Rebuttal Report Musical Example 2 above.

36. By way of additional similarities, the first and last notes are on scale degree 5 in melodic Phrase 1 of both "Emmanuel" and "Christ". Scale degree 5 is the lowest pitch in melodic Phrase 1 of both "Emmanuel" and "Christ". Scale degree 3 is the highest pitch in melodic Phrase 1 of both "Emmanuel" and "Christ".

<sup>6</sup> As noted above, scale degree 2 in "Emmanuel" is an intervening differing scale degree in the otherwise identical sequence of pitches in melodic Phrase 1 of "Christ".

37. As illustrated in Rebuttal Report Musical Example 2 above, the melody in “Christ” begins one beat later than the melody in “Emmanuel”. This causes the metrical placements (i.e., the placement on beats within a bar) to differ. The melodic analysis in Pages 2-5 of the Finell Report fails to properly assess the impact on metrical placements of corresponding notes due to the fact that the melody in “Christ” starts one beat later than the melody in “Emmanuel”, as explained above.

38. Now moving to melodic Phrase 2, as shown in Rebuttal Report Musical Example 3 below, 6 out of a total of 8 notes (75%) in “Christ” share the same scale degrees (**5-1-2-3-4-[2-7]-1**) with 8 corresponding notes in “Emmanuel” as shown above<sup>7</sup>. Moreover, 4 of the 8 notes in Phrase 2 of “Christ” share the same rhythmic durations (quarter notes in bar 1 on scale degrees **5-1-2** and in bar 3 on scale degree **4**) with corresponding notes in “Emmanuel”.

39. By way of additional similarities, the first note is on scale degree 5 and the last note is on scale degree 1 in melodic Phrase 2 of both “Emmanuel” and “Christ”. Scale degree 5 is the lowest pitch in melodic Phrase 2 of both “Emmanuel” and “Christ”. Scale degree 4 is the highest pitch in melodic Phrase 2 of both “Emmanuel” and “Christ” as shown in Rebuttal Report Musical Example 3 below. Notably, the melodic similarities in Phrase 1 are consecutively developed and extended in Phrase 2 in “Emmanuel” and “Christ”.

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<sup>7</sup> As noted above, scale degree 3 in “Emmanuel” and scale degree 7 in “Christ” are intervening differing scale degrees.

### REBUTTAL REPORT MUSICAL EXAMPLE 3

#### Phrase 2 (as per the published sheet music and the Finell Report)

Notes with the same scale degree are highlighted in red

The image shows two staves of musical notation in 3/4 time, both in the key of D major (indicated by two sharps). The top staff is labeled "Emmanuel" and the bottom staff is labeled "Christ". Above each staff, scale degrees are indicated by numbers 1 through 7. Notes with the same scale degree are highlighted in red.

For "Emmanuel", the scale degrees are: 5 (red), 1 (red), 2 (red), 3 (red), 4 (red), 3 (red), 2 (red), 1 (red). The notes are: D4 (quarter), E4 (quarter), F#4 (quarter), G4 (quarter), A4 (quarter), G4 (quarter), F#4 (quarter), E4 (half).

For "Christ", the scale degrees are: 5 (red), 1 (red), 2 (red), 3 (red), 4 (red), 2 (red), 7 (red), 1 (red). The notes are: D4 (quarter), E4 (quarter), F#4 (quarter), G4 (quarter), A4 (quarter), G4 (quarter), F#4 (quarter), E4 (half).

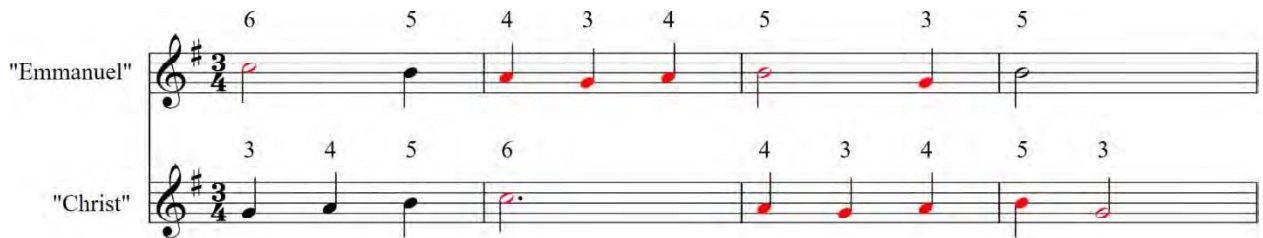
40. Staying with melodic Phrase 2 and Rebuttal Report Musical Example 3 immediately above, the melody in "Christ" begins one beat later than the melody in "Emmanuel". This causes the metrical placements (i.e., the placement on beats within a bar) to differ. As noted above, the melodic analysis in Pages 2-5 of the Finell Report fails to properly assess the impact on metrical placements of corresponding notes due to the fact that the melody in "Christ" starts one beat later than the melody in "Emmanuel".

41. Now moving to melodic Phrase 3, 6 out of a total of 9 notes (66.6%) in "Christ" share the same scale degrees (**6-4-3-4-5-3**) with 8 corresponding notes in "Emmanuel" and 3 of the 9 notes in Phrase 3 of "Christ" share the same rhythmic durations (quarter notes in bar 3 on scale degrees **4-3-4**) with corresponding notes in "Emmanuel" as shown in Rebuttal Report Musical Example 4 below. Importantly, the melodic similarities that are in Phrase 1 are consecutively developed and extended in Phrase 2 which are consecutively developed and extended in Phrase 3 creating an exceedingly similar melodic development of the 26-note, 12-bar very long melodies at issue in "Emmanuel" and "Christ".

## REBUTTAL REPORT MUSICAL EXAMPLE 4

## Phrase 3 (as per the published sheet music and the Finell Report)

Notes with the same scale degree are highlighted in red



42. Notably, as transcribed in the *Finell Report*, in terms of the highest pitches in each of the three consecutive melodic phrases that constitute the very long melody over 12 bars in "Emmanuel" and the very long melody over 12 bars in "Christ, the development of the melody in the Verses in bars 1-12 in "Emmanuel" and "Christ" is the same: the highest pitch in melodic Phrase 1 (bars 1-4) is on scale degree "3", the highest pitch in melodic Phrase 2 (bars 5-8) is on scale degree "4", and the highest pitch in melodic Phrase 3 (bars 9-12) is on scale degree "6" in both "Emmanuel" and "Christ".

43. As transcribed in the *Finell Report*, in terms of the lowest pitches in each of the three consecutive melodic phrases the very long melodies at issue, the development of the melody in the Verses in bars 1-12 in "Emmanuel" and "Christ" is the same: the lowest pitch in melodic Phrase 1 (bars 1-4) is on scale degree "5", the lowest pitch in melodic Phrase 2 (bars 5-8) is on scale degree "5", and the lowest pitch in melodic Phrase 3 (bars 9-12) is on scale degree "3" in both "Emmanuel" and "Christ".

44. Thus, the melodic development of highest and lowest pitches in melodic Phrases 1, 2, and 3 over bars 1-12 of the Verses in "Emmanuel" and "Christ", as transcribed in the *Finell Report*, is identical: the development of the highest notes is identical from scale degree "3" (Phrase 1), to scale degree "4" (Phrase 2), to scale degree "6" (Phrase 3) and the development of the lowest notes is identical with scale

degree “5” in Phrases 1 and 2 and scale degree “3” in Phrase 3, ascending exactly the interval of a perfect 4<sup>th</sup> from the lowest note on scale degree “5” in Phrases 1 and 2 in “Emmanuel” and “Christ”.

45. The analysis of the melodies in Paragraph 4 of the Finell Report omits one bar in each song, namely bar 12 in “Emmanuel” and bar 9 in “Christ”. That omission aligns the melodies in bars 9-11 of “Emmanuel” with bars 10-12 of “Christ” which facilitates a comparative analysis. Consistent with that alignment in the Finell Report, Rebuttal Report Musical Example 5 below aligns bars 9 – 11 in “Emmanuel” with bars 10 – 12 in “Christ”. Therein, 6 out of a total of 6 notes (100%) in “Christ” share the same scale degrees (**6-4-3-4-5-3**) and 3 of those 6 notes in “Christ” share the same rhythmic durations (quarter notes in bar 2 on scale degrees **4-3-4**) with 7 corresponding notes in “Emmanuel”.

#### REBUTTAL REPORT MUSICAL EXAMPLE 5

##### Bars 9-11 of “Emmanuel” and Bars 10-12 of “Christ”

Notes with the same scale degree are highlighted in red

The image displays two musical staves, one for "Emmanuel" and one for "Christ", both in 3/4 time. Above each staff, scale degrees are indicated: 6, 5, 4, 3, 4, 5, 3. Notes corresponding to these degrees are shown on the staves. In the "Emmanuel" staff, the notes for degrees 6, 4, 3, 4, and 5 are highlighted in red. In the "Christ" staff, the notes for degrees 6, 4, 3, 4, 5, and 3 are highlighted in red. The "Emmanuel" staff has a treble clef and a key signature of one sharp (F#). The "Christ" staff also has a treble clef and a key signature of one sharp (F#).

46. By way of additional similarities between bars 9-11 of “Emmanuel” and bars 10-12 of “Christ” as shown in Rebuttal Musical Example 5 immediately above, the first note is on scale degree 6 and the last note is on scale degree 3, scale degree 3 is the lowest pitch, and scale degree 6 is the highest pitch, as presented in Paragraph 4 on Page 3 of the Finell Report.

THE “CONCLUSIONS” TO PART 1 OF THE FINELL REPORT REFLECT A MISLEADING AND INCOMPLETE ANALYSIS OF “EMMANUEL” AND “CHRIST”

47. The “Conclusions” to Part 1 on Page 11 of the Finell Report reflect the misleading and incomplete analysis of “Emmanuel” and “Christ” in Part 1 of the report. In fact, the following very significant aggregate of twenty-three (23) similarities are shared in “Emmanuel” and “Christ” and are empirically verified *in the transcriptions in the Finell Report*.<sup>8</sup>

- A. The key of E minor
- B. 3/4 meter
- C. Verse/Refrain form
- D. Verses that are exactly 16 bars in length
- E. Melodic phrases in each Verse that are exactly 4-bars each
- F. A total of exactly 26 notes in Phrases 1, 2, and 3 in the melody in bars 1 – 12 of each Verse
- G. The entire 12-bar melody at issue is wholly based on the E natural minor scale with no “leading tone” D-sharp
- H. The entire 12-bar harmony at issue does not include a single B major (“dominant”) chord
- I. Consecutive and contiguous melodic development of the Verse melody in Phrase 1, Phrase 2, and Phrase 3 from bars 1 – 12

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<sup>8</sup> While similarities such as 3/4 meter, the key of E minor, and a Verse/Refrain form are musical building blocks, they add to and combine with the very significant melodic similarities in bars 1-12 of each Verse which include the exceedingly similar melodic phrase structure and development of the very long melody in bars 1-12 of “Emmanuel” and bars 1-12 of “Christ”. As shown below, none of the prior art works in the Finell Report even remotely embody this melodic similarity, let alone the aggregate of 23 similarities that are shared between “Emmanuel” and “Christ”.

- J. In melodic Phrase 1, all 9 notes (100%) in “Christ” share the same scale degrees (**5-1-2-3-2-1-7-1** ending on **5**) with 9 of the total of 10<sup>9</sup> corresponding notes in “Emmanuel”.
- K. In melodic Phrase 1, 7 out of 9 notes (77.7%) in “Christ” share the same rhythmic durations with corresponding notes in “Emmanuel”.
- L. The first and last notes of melodic **Phrase 1** in of “Emmanuel” and “Christ” are on scale degree 5.
- M. Scale degree 5 is the lowest pitch in melodic **Phrase 1** of “Emmanuel” and “Christ”.
- N. Scale degree 3 is the highest pitch in melodic **Phrase 1** of “Emmanuel” and “Christ”.
- O. In melodic Phrase 2, 6 out of a total of 8 notes (75%) in “Christ” share the same scale degrees (**5-1-2-3-4** ending on **1**) with corresponding notes in “Emmanuel”.
- P. In melodic Phrase 2, 4 out of those 8 notes (50%) share the same rhythmic durations with corresponding notes in “Emmanuel”.
- Q. The first note is on scale degree 5 and the last note is on scale degree 1 in melodic **Phrase 2** of “Emmanuel” and “Christ”.
- R. Scale degree 5 is the lowest pitch in melodic **Phrase 2** of “Emmanuel” and “Christ”.
- S. Scale degree 4 is the highest pitch in melodic **Phrase 2** of “Emmanuel” and “Christ”.

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<sup>9</sup> As noted above, scale degree 2 in “Emmanuel” is an intervening differing scale degree in the otherwise identical sequence of pitches in melodic Phrase 1 of “Christ”.

- T. In melodic Phrase 3<sup>10</sup>, 6 out of a total of 9 notes (66.6%) in “Christ” share the same scale degrees (6-4-3-4-5-3) with 8 corresponding notes in “Emmanuel”.
- U. In melodic Phrase 3, 3 notes (33.3%) share the same rhythmic durations with corresponding notes in “Emmanuel”.
- V. Scale degree 6 is the highest pitch in melodic **Phrase 3** of “Emmanuel” and “Christ”.
- W. Scale degree 3 is the lowest pitch in melodic **Phrase 3** of “Emmanuel” and “Christ”.

48. In summary, *as transcribed in the Finell Report*, out of a total of 26 notes in bars 1-12 of the Verses in both “Emmanuel” and “Christ”, 21 notes (80.7%) share the same scale degrees and 14 notes (53.8%) share the same scale degrees and rhythmic durations. Moreover, the 12-bar melody in “Emmanuel” and the 12-bar melody in “Christ” are developed in exceedingly similar ways in three consecutive melodic phrases. For example, the melodic development of highest and lowest pitches in Phrases 1, 2, and 3 over bars 1-12 of the Verses in “Emmanuel” and “Christ”, *as transcribed in the Finell Report* and as shown above, is identical.

49. As to the metrical placements, the melody at issue in “Christ” starts one beat later than the melody at issue in “Emmanuel”. That shifting of the metrical placement of the starting note by one beat causes many of the notes in the melodies at issue to differ in their metrical placements. The Finell Report does not properly assess this important fact. Track 1 on **Rebuttal Report Audio Exhibit 1** shows that even when

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<sup>10</sup> As noted above, the analysis of the melodies in Paragraph 4 of the Finell Report aligns and compares bars 9-11 of “Emmanuel” with bars 10-12 of “Christ” which facilitates a comparative analysis. Based on that alignment of three bars in melodic Phrase 3 in the Finell Report and as shown in Rebuttal Report Musical Example 5 above, 6 out of a total of 6 notes (100%) in “Christ” share the same scale degrees (6-4-3-4-5-3) with 7 corresponding notes in “Emmanuel” and 3 of those 6 notes in “Christ” share the same rhythmic durations with corresponding notes in “Emmanuel”.

all of the notes in the opening melodic phrase in “Mary Had a Little Lamb” are played with different metrical placements and when the rhythmic duration is changed in one note, it is clear that the altered melody copied the original melody, and that the similarity in the melodies is still evident. This is also the case with respect to the 12-bar melodies at issue in “Emmanuel” and “Christ”. Starting the melody in “Christ” one beat later than the melody in “Emmanuel” and the resultant differences in metrical placement should not create a cover and excuse for denying the very strong objective musicological evidence of copying, nor should starting a melody one beat later be allowed to undermine the very significant similarities in the very long 26-note melodies over 12-bars at issue in “Emmanuel” and “Christ”, as discussed above.

## **II. B. THE FINELL REPORT: “PART 2”, PRIOR ART**

### **THE PRIOR ART IN THE FINELL REPORT FALLS FAR SHORT OF THE AGGREGATE OF SIMILARITIES SHARED BY “EMMANUEL” AND “CHRIST”**

50. The very significant aggregate of twenty-three (23) similarities shared between “Emmanuel” and “Christ” (1) are empirically verified *in the transcriptions in the Finell Report*, (2) very strongly support a claim of copying, (3) embody a very significant amount of expression, and (4) do not exist in any prior art work proffered in the Finell Report. Notably, the most substantive similarities at issue are found in a 26-note melody that consists of three consecutive melodic phrases over bars 1-12 respectively in the Verses of “Emmanuel” and “Christ”. The significant melodic similarities (which include melodic phrase structure and development of those three consecutive melodic phrases) shared in “Emmanuel” and “Christ” are absent in each and every prior art work proffered in the Finell Report.

### **THE FINELL REPORT’S METHOD OF ANALYSIS OF PRIOR ART IS FLAWED AND CONTRADICTS ITS OWN ANALYSIS OF “EMMANUEL” AND “CHRIST”**

51. Part 2 of the Finell Report (on Pages 12-29) presents 15 prior art works. Regarding its method of selection and analysis of prior art, the Finell Report states:

“In order to determine originality of the similar features at issue here, a search was conducted for prior musical works containing a similar succession of scale degrees as found in the verses of ‘Christ’ and ‘Emmanuel’.” [Finell Report, ¶22, p. 12]

In Paragraph 25, the Finell Report reiterates this narrow delimitation to “scale degrees” in the selection and analysis prior art as follows:

“The search focused on identifying similar series of scale degrees, rather than durations (rhythms) or metric positions....” [Finell Report, ¶25, p. 14]

52. This expressed method in the Finell Report regarding prior art is contrary to the Finell Report’s own analysis of the melodies at issue in “Emmanuel” and “Christ” in Part 1 of the report. For example, on Page 2, the Finell Report states:

“Melody consists of (a) pitch plus (b) rhythm (duration) within the context of (c) metrical placement. The melodies of ‘Emmanuel’ and ‘Christ’ were compared for similarities in pitch, rhythm, and metrical placement based on the sheet music provided.” [Finell Report, ¶3, p. 2]

Thus, in its definition of melody and in its method of analysis of the melodies at issue in “Emmanuel” and “Christ”, the Finell Report compares (1) pitch, (2) rhythm (i.e., rhythmic duration), and (3) metrical placement. By way of self-contradiction and inconsistency with its own definition of “melody”, the stated method of analysis of prior art in the Finell Report, as cited above, is reduced to a single element, pitch (i.e., scale degrees). The Finell Report’s flimsy and faulty reason for this self-contradiction and delimitation in its method of analysis of prior art is that rhythmic durations and metric positions “differ considerably between” “Emmanuel” and “Christ”. [Finell Report, ¶25, p. 14] However, as shown above, out of a total of 26 notes in bars 1-12 in both “Emmanuel” and “Christ”, 21 notes (80.7%) share the same scale degrees and 14 notes (53.8%) share the same scale degrees and the same rhythmic durations *as transcribed in the Finell Report*. As to the metrical placements, the melody at issue in “Christ” starts one beat later than the melody at issue in “Emmanuel”. That shifting of the metrical placement of the starting

note by one beat (1) does not mitigate the exceedingly strong objective musicological evidence of copying while (2) it causes many of the notes in the melodies at issue to differ in their metrical placements, as explained above.

53. By way of additional self-contradiction, while the (1) harmonies and (2) overall structures (i.e., analysis of the Verse/Refrain structure) in “Emmanuel” and “Christ” are considered, there is no consideration of the overall structures or harmonies in the prior art works.

54. Moreover, as explained earlier in this rebuttal report, the Finell Report’s analysis of the melody in “Emmanuel” and “Christ” omits the analysis of melodic development although melodic development is included in the entry on “Melody” in the 29-Volume *The New Grove Dictionary* as cited above.

#### THE FINELL REPORT FAILED TO PROVIDE DIRECT LINKS OR PDF COPIES OF THE PRIOR ART IT PRESENTS

55. The Finell Report failed to provide direct links or PDF copies of the sheet music of the 15 prior art works it presents. Table 3 on Pages 14-16 of the Finell Report does not provide links to the prior art works it lists. Therefore, the accuracy, or lack thereof, of the transcriptions of prior art in the Finell Report cannot be assessed insofar as direct access to the sources which those transcriptions presumably copy was not provided.

#### BASED ON SOURCES OF PRIOR ART, SOME TRANSCRIPTIONS OF PRIOR ART IN THE FINELL REPORT OMIT SUBSTANTIAL PORTIONS OF THE MELODIES

56. I was able to locate 11 of the 15 prior art works listed in the Finell Report. (The four prior art works that I did not find online are “Enviado soy de Dios”, “La paz del Señor”, “O Holy Spirit Comforter”, and “Farewell Ungrateful Traitor”.) However, of those 11 sources that I found, not all of them were the same as the sources listed in Table 3 of the Finell Report. In **Rebuttal Report Visual Exhibit B**, I attached PDFs of the 11 prior art works that I found and downloaded. In keeping with scholarly standards

and practices, direct online sources of the 11 prior art works that I downloaded are provided immediately below.

**Online Sources for PDFs in Rebuttal Report Visual Exhibit B**

1. "Consolation (The King Shall Come)":  
<https://hymnary.org/page/fetch/HTLG2017/80/high>
2. "Wakefield Jigg": [https://tunearch.org/wiki/Wakefield\\_Jigg](https://tunearch.org/wiki/Wakefield_Jigg)
3. "Take Up Your Cross": <https://hymnary.org/hymn/TPH2018/511>
4. "If Thou But Suffer God to Guide Thee":  
<https://hymnary.org/hymn/TPH2018/page/743>
5. "At The Name of Jesus":  
[https://imslp.org/wiki/At\\_the\\_Name\\_of\\_Jesus\\_\(Vaughan\\_Williams%2C\\_Ralph\)](https://imslp.org/wiki/At_the_Name_of_Jesus_(Vaughan_Williams%2C_Ralph))
6. "All On The Dawns":  
<http://www.themefinder.org/cgi-bin/themeinfo?istn=868890012088>
7. "Fare Ye Well, Lovely Nancy": <https://www.vwml.org/record/GG/1/7/397>
8. "Black-Eyed Susan": <https://www.jstor.org/stable/43590034>. The score is part of an article about this song, and is on Page 13 of the PDF.
9. "The Huron Carol":  
[https://imslp.org/wiki/The\\_Huron\\_Carol\\_\(Oczko%2C\\_Michael\\_John\)](https://imslp.org/wiki/The_Huron_Carol_(Oczko%2C_Michael_John)).
10. "The God of Abraham": <https://hymnary.org/hymn/MHTB1917/page/182>
11. "O God of Every Nation":  
[https://hymnary.org/text/o\\_god\\_of\\_every\\_nation#authority\\_media\\_flexscores](https://hymnary.org/text/o_god_of_every_nation#authority_media_flexscores)

57. Of the 11 prior art works listed above, the following 8 downloaded PDF prior art scores (attached as **Rebuttal Report Visual Exhibit B**) have differences from the transcriptions in the Finell Report as explained immediately below. Indeed, some of

the transcriptions of prior art in the Finell Report omit substantial parts of the melody in the prior art works it presents without any explanation.

*"Consolation" tune / "The King Shall Come When Morning Dawns":*

In bars 4 and 8, the pitch on beat 1 is notated as a dotted half note in the score I found but it is notated as a half note followed by a quarter rest in the Finell Report. The score has been transposed from F minor to E minor in the Finell Report.

*"If Thou But Suffer God to Guide Thee" as "If Thou but Trust in God to Guide Thee":*

In bar 4, the pitch on beat 2 is notated as a half note in the score I found but it is notated as a quarter note followed by a quarter rest in the Finell Report. Bars 9-16 in the score I found are written out, while in the Finell Report they are notated with a repeat sign. Therefore, bar 9 of the Finell Report corresponds to bar 17 of the score I found. In bar 17, the first pitch on beat 1 is on scale degree 2 but in the Finell Report the first pitch on beat 1 is on scale degree 3. The final two bars that are notated in the Finell Report are not present in the score I found. The score has been transposed from G minor to E minor in the Finell Report.

*"At the Name of Jesus":*

Only bars 1-4 of the score I found are included in the Finell Report. The melody in the subsequent **12 bars (bars 5-16) is omitted** in the Finell Report without any explanation.

*"All On the Dawns":*

Bars 5 and 6 in the score I found are omitted in the Finell Report without any explanation. The score has been transposed from G minor to E minor in the Finell Report.

*"Fare Ye Well, Lovely Nancy":*

The first pickup note of the score I found is missing a flag, making the rhythmic duration a dotted quarter. However, given the half note in bar 16, it is more likely that the rhythmic duration of the first note is a dotted eighth, as it is in the Finell Report. The final beat in bar 16 is not notated in the score I found as it is present in the pickup notes. This beat is notated in bar 16 of the Finell Report. The score has been transposed from A minor to E minor in the Finell Report.

*"Black-Eyed Susan":*

The score on Page 13 of the 18-page PDF article I found consists of 14 bars. The Finell Report (only) includes bars 1 and 2 (transposed from G minor to E minor) and thereby **the Finell Report omits 12 bars (bars 3-14)** without any explanation.

*"The Huron Carol":*

The score I found is notated in 4/4 meter, while the Finell report is notated in 2/4 meter. In the Solo Soprano melody in bar 6 of the score I found (sung to the words "angel choirs instead"), the scale degrees of the notes are 1-1-2-7-1. By way of difference, in the Finell Report (in bars 7-8) they are notated on scale degrees 1-3-2-7-1. Thus, the second note is different in the score I found as compared with the transcription in the Finell Report. In addition, in beat 3 of bar 7 of the score I found, the rhythmic durations are notated in even eighth notes. By way of difference, in the Finell Report, the corresponding two notes (on beat 1 of bar 10) are notated with a dotted eighth followed by a sixteenth. These differences in rhythmic durations of the melody continue on beat 3 of bar 8 in the score I found as compared with the corresponding beat 1 of bar 12 in the Finell Report. From beat 4 in bar 10 of the score I found, the arrangement is different and does not match from bar 16 of the Finell Report.

*"The God of Abraham":*

The score I found has doubled note values as compared with the Finell Report. The Finell Report only includes a transcription of the melody in bars 1-4 of the score I found. **The Finell Report omits the melody in 14 bars (bars 5-16 plus a final bar sung to "Amen")** without any explanation. The melody has been transposed from G minor to E minor in the Finell Report.

*"O God of Every Nation":*

The Finell Report only includes a transcription of the melody in bars 1-2 of the score I found. **The Finell Report omits bars 3-16** without any explanation. The score has been transposed from F minor to E minor in the Finell Report.

THE MELODIC SIMILARITIES IN THE FINELL REPORT'S PRIOR ART DO NOT NEARLY EMBODY THE MELODIC SIMILARITIES SHARED BY "EMMANUEL" AND "CHRIST"

58. As noted above, contrary to its own analytical method regarding the melodies at issue in "Emmanuel" and "Christ", the Finell Report states that it delimits its selection and analysis of the melodies in prior art to the pitches as scale degrees.

59. The Finell Report uses "colored boxes" to show the alleged presence of melodic Phrase 1, Phrase 2, and/or Phrase 3 in its prior art transcriptions as cited immediately below.

"For guidance in the comparison, colored boxes surround the passages described in the accompanying text. A red box indicates similarities with phrase 1; a green box indicates similarities with phrase 2; and a blue box indicates similarities with phrase 3." [Finell Report, ¶26, p. 16]

60. Contrarily, the Finell Report does not use its red, green, and blue "colored boxes" in its analysis of the melodies at issue in "Emmanuel" and "Christ". In Rebuttal Report Musical Example 6 below, the Finell Report's red, green, and blue "colored

boxes” are used in a comparative transcription of the 12-bar melodies at issue in “Emmanuel” and “Christ”. The notes and scale degree numbers are from the Finell Report.

### REBUTTAL REPORT MUSICAL EXAMPLE 6

#### Phrases 1, 2 and 3 in the 12-bar melodies at issue in “Emmanuel” and “Christ”

The image displays musical notation for two pieces, "Emmanuel" and "Christ", in 3/4 time with a key signature of one sharp (F#). The notation includes scale degree numbers above the notes. Colored boxes highlight specific phrases:

- Red boxes:** Highlight the first 11 notes of the "Emmanuel" melody (scale degrees 5, 1, 2, 3, 2, 1, 7, 1, 2, 5) and the first 10 notes of the "Christ" melody (scale degrees 5, 1, 2, 3, 2, 1, 7, 1, 5).
- Green boxes:** Highlight the 12th note of the "Emmanuel" melody (scale degree 5) and the first 10 notes of the second staff (scale degrees 5, 1, 2, 3, 4, 2, 7, 1).
- Blue boxes:** Highlight the last 8 notes of the second staff (scale degrees 6, 5, 4, 3, 4, 5, 3, 5, 3) and the last 8 notes of the third staff (scale degrees 3, 4, 5, 6, 4, 3, 4, 5, 3).

61. The musical example immediately above inserts the Finell Report’s “colored boxes”. Thereby, **red** (Phrase 1), **green** (Phrase 2), and **blue** (Phrase 3) boxes visually demonstrate the consecutive and contiguous development of the 26-note, 12-bar melodies in “Emmanuel” and “Christ”. The very significant similarities in those melodies were demonstrated above. *Insofar as the Finell Report fails to provide any tripartite transcriptions of prior art works with “Emmanuel” and “Christ”* (and every prior art transcription in the Finell Report is isolated from transcriptions of “Emmanuel” or “Christ”), single transcriptions of “Emmanuel” and “Christ” are provided in Rebuttal Report Musical Example 7 below to further clarify the consecutive and contiguous development of Phrases 1, 2, and 3 in “Emmanuel” and “Christ”.

## REBUTTAL REPORT MUSICAL EXAMPLE 7

Individual Phrases 1, 2 and 3 in the 12-bar melodies in “Emmanuel” and “Christ”

"Emmanuel"

"Christ"

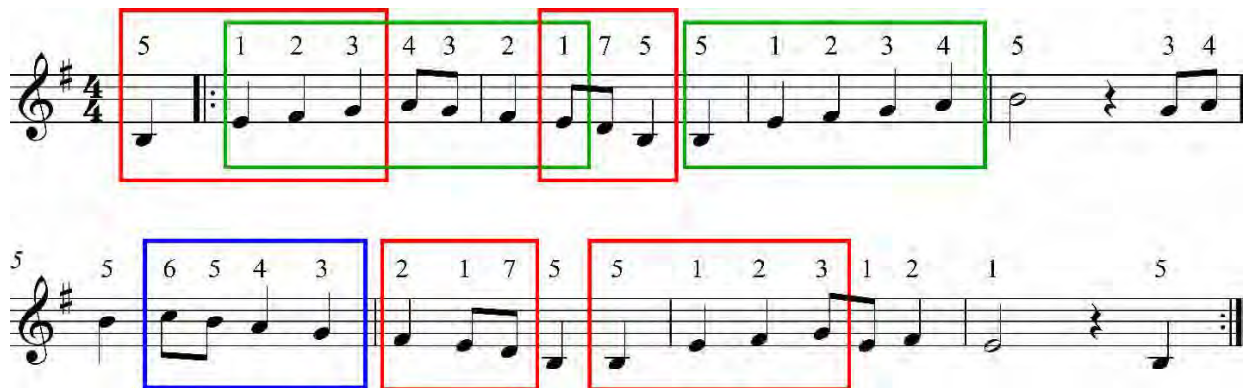
THE PRIOR ART WORK, “CONSOLATION”, DOES NOT REMOTELY EMBODY THE MELODIC SIMILARITIES AT ISSUE, LET ALONE THE AGGREGATE OF 23 SIMILARITIES THAT ARE SHARED BETWEEN “EMMANUEL” AND “CHRIST”

62. The musical example immediately below is an exact copy of the musical example on Page 17 in the Finell Report of its first prior art work, “Consolation”. The musical example immediately below can be easily compared with the color coded boxes

inserted on “Emmanuel” and “Christ” in Musical Example 7 immediately (on Page 33) above.

[Copied and pasted from Page 17 of the Finell Report.]

“Consolation”



63. In the transcription of “Consolation” in the Finell Report (copied immediately above), the first **green** box (Phrase 2) overlaps with two **red** boxes (Phrase 1). These melodic phrases are not consecutive. Rather, **red** boxed melodic snippets of Phrase 1 are cherry-picked and significantly interrupt the **green** boxed Phrase 2. Moreover, the fragment of the **blue** box (Phrase 3) is followed by two more **red** boxed melodic snippets of Phrase 1. Indeed, the consecutive and uninterrupted development of Phrase 1 to Phrase 2 to Phrase 3 in both “Emmanuel” and “Christ” is completely absent in “Consolation”, as *transcribed and boxed in the Finell Report* and visually demonstrated in Rebuttal Musical Examples 6 and 7 above.

64. Further undercutting the meager, fragmented, interrupted, and cherry-picked alleged (boxed) melodic phrases in “Consolation”, the Finell Report fails to provide any analysis beyond listing and counting some of the scale degrees. The Finell Report also fails to provide any tripartite analysis of the melodies (let alone other elements at issue) in “Consolation”, “Emmanuel”, and “Christ”.

65. On the basis of my analysis above, I found that the melodic expression (which includes the melodic phrase structure and melodic development) in “Consolation” as *transcribed and boxed in the Finell Report*, is substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ”, which includes a respective 26-note melody that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. Moreover, “Consolation” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ”.

THE REMAINING 14 PRIOR ART WORKS DO NOT REMOTELY EMBODY THE MELODIC SIMILARITIES, LET ALONE THE AGGREGATE OF 23 SIMILARITIES THAT ARE SHARED BETWEEN “EMMANUEL” AND “CHRIST”

66. The remaining 14 prior art works in Part 2 of the Finell Report do not remotely embody the melodic similarities, let alone the full aggregate of (23) similarities that are shared between “Emmanuel” and “Christ”, as shown below.

“Enviado soy de Dios”

67. A transcription of “Enviado soy de Dios”<sup>11</sup> (hereafter, “Enviado”) is on Page 18 of the Finell Report. As seen therein, the consecutive and contiguous melodic phrase structure and melodic development shared in “Emmanuel” and “Christ” are absent in “Enviado”. Fragments of Phrase 1 are cherry-picked within two **red** boxes (in bars 1 and 4) that are interrupted by a **green** box (Phrase 2). After the interrupted and fragmentary **red** boxed melodic snippet of Phrase 1 in bar 4, Phrase 3 in the **blue** box follows Phrase 1 (not Phrase 2). Moreover, the two **blue** boxes respectively in bars 5 and 8 are not only fragmentary, they are separated by two full bars of melodic expression that has not been boxed in the Finell transcription and is thereby not part of Phrase 1, 2, or 3. Clearly, these purported melodic phrases are not remotely consecutive and the melodic phrase structure and development in “Enviado” is substantially different from that in “Emmanuel” and “Christ”.

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<sup>11</sup> “Enviado soy de Dios” is incorrectly spelled (as “Envisados...”) on page 18 of the Finell Report whereas it is correctly spelled in Table 3 on Page 14 of the Finell Report.

68. Further undercutting the flimsy, fragmented, interrupted, and cherry-picked alleged melodic phrases in “Enviado”, the Finell Report fails to provide any analysis beyond a conclusory statement, namely: “It [“Enviado”] contains most of the pitch material of the 3 phrases at issue, with additional repetitions plus a raise seventh scale degree”. [Finell Report, ¶b. p. 18] First, with respect to the “pitch material of the 3 phrases at issue”, no analysis supports that conclusion and the interruptive, fragmented and cherry-picked melodies in the “Enviado” transcription in the Finell Report falls far short of the similarities shared by “Emmanuel” and “Christ” by any musicological measure.

69. Second, “Enviado” has a raised (#) seventh scale degree, which is a difference; the melodies at issue in “Emmanuel” and “Christ” (in the Verses) do not have any raised seventh scale degree. Thus, the unsupported conclusory statement cited above points to a difference, not a similarity, with the melodic phrases at issue. In Footnote 18 on Page 18, the Finell Report states that the “Introduction” of “Emmanuel” includes a raised scale degree 7. First, the Finell Report fails to provide a copy of that sheet music. Second, the raised seventh scale degree in “Enviado” is a difference with respect to the Verse melodies at issue in “Emmanuel” and “Christ”. Third, a raised seventh scale degree has a very different melodic function from a lowered scale degree 7. The raised “leading tone” scale degree is a half tone below scale degree 1. The lowered scale degree 7 in the melodies at issue in “Emmanuel” and “Christ” is called the “subtonic” and it is a whole (not half) tone below scale degree 1.<sup>12</sup> The Finell Report fails to provide any tripartite analysis of the melodies (let alone other elements at issue) in “Enviado”, “Emmanuel”, and “Christ” but instead, provides a conclusory statement that includes a difference between the melodies at issue in “Emmanuel” and “Christ” and the melody in “Enviado”. Moreover, the 4/4 meter and significantly different rhythmic durations of the notes throughout “Enviado” as compared with “Emmanuel” and “Christ” (such as the dotted eighth note followed by a sixteenth note rhythmic durations on beat 1 of every bar in “Enviado”, rhythmic durations which are completely

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<sup>12</sup> For example, see Jane Piper Clendinning and Elizabeth West Marvin, *The Musician’s Guide to Theory and Analysis* (Second Edition), W. W. Norton, 2011, pp. 102-103. Also see “Leading tone, note” in *The Harvard Dictionary of Music*, p. 459.

absent in the melodies at issue in “Emmanuel” and “Christ”) are omitted from any analysis in the Finell Report.

70. On the basis of my analysis above, I found that the melodic expression (including the melodic phrase structure and the melodic development) in “Enviado” as *transcribed and boxed in the Finell Report*, is substantially less similar than the melodic expression that is shared in “Emmanuel” and “Christ”. The scattered and disjointed purported boxed melodic similarity in “Enviado” as well as the difference in its raised scale degree 7 do not come close to the very significant melodic similarities at issue and shared by “Emmanuel” and “Christ”, each of which embodies a respective 26-note melody that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. Moreover, “Enviado” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ”.

#### “Wakefield Jigg”

71. A transcription of “Wakefield Jigg” (hereafter, “Wakefield”) is on Page 19 of the Finell Report. As seen therein, there are huge gaps between the **red** (Phrase 1), **green** (Phrase 2), and **blue** (Phrase 3) boxes. The consecutive and contiguous melodic phrase structure and melodic development from Phrase 1 to Phrase 2 to Phrase 3 shared in “Emmanuel” and “Christ” are absent in “Wakefield”.

72. Further, the Finell Report fails to provide any analysis beyond counting scale degrees. Notably, the Finell Report concedes that scale degree 7 is “raised”, which is different from scale degree 7; the melodies at issue in “Emmanuel” and “Christ” (in the Verses) do not have any raised seventh scale degree and a raised seventh scale degree has a very different melodic function from a lowered scale degree 7 as explained (with citations) above.

73. On the basis of my analysis above, I found that the melodic expression (including the melodic phrase structure and the melodic development) in “Wakefield” as *transcribed and boxed in the Finell Report*, is substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ”, each of which

embodies a respective 26-note melody that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. In addition to the underwhelming melodic similarity (such as in melodic phrase structure, melodic development, and the different raised scale degree 7), “Wakefield” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

“La paz del Señor”

74. A transcription of “La paz del Señor” (hereafter, “La paz”) is on Page 20 of the Finell Report. As seen therein, Phrase 2 (a green box), is missing. The scale degree numbers in the red (Phrase 1) box expose the flawed identification of a purported Phrase 1. First, the final note in the red box is clearly not part of the opening melodic phrase. Using the scale degrees in Phrase 1 of “Emmanuel” and “Christ” as charted in Paragraph 4 on Page 2 of the Finell Report, the scale degrees in “La paz” as transcribed on Page 20 of the Finell Report are added to the chart below. (As noted in the Finell Report, intervening differing scale degrees are shown in brackets.)

“La paz” (bars 1-4):	<b>5-1[-1-1-] -3 [-3] -2 [-2-2-#7]</b>
“Emmanuel” (bars 1-4):	<b>5-1-2-3-2-1-7-1-[2]-5</b>
“Christ” (bars 1-4):	<b>5-1-2-3-2-1-7-1- 5</b>

As shown above, only the first two scale degrees line up. Thereafter, one must generously cherry-pick scale degrees “3” and “2” (with red highlights) in “La paz”. Even doing so, the similarity in the pitches is far less between the opening phrase in “La paz” and Phrase 1 in “Emmanuel” or “Christ” as compared with the similarity in Phrase 1 between “Emmanuel” and “Christ”, *as transcribed in the Finell Report*.

75. Moreover, scale degree 7 is raised in “La paz” but, by way of difference in pitch and function, scale degree 7 is lowered in the 12-bar melodies at issue in “Emmanuel” and “Christ” as explained and cited above. The melodies in the Verses of “Emmanuel” and “Christ” do not include a raised scale degree 7. Thus, the raised scale degree 7 in “La paz” represents a melodic difference as compared with the melodies at issue in “Emmanuel” and “Christ”.

76. As shown on Page 20 of the Finell Report, the purported red (Phrase 1) box is not followed by a green (Phrase 2) box. Rather, in “La paz”, the opening phrase is followed by a very different melody from the melodies at issue. An isolated fragmented purported blue (Phrase 3) box appears on the second staff preceded and followed by very different melodic expression from the melodies at issue. Clearly, the consecutive and contiguous melodic phrase structure and melodic development from Phrase 1 to Phrase 2 to Phrase 3 shared in “Emmanuel” and “Christ” is absent in “La paz”.

77. On the basis of my analysis above, I found that the melodic expression (including the melodic phrase structure and the melodic development) in “La paz”, as *transcribed and boxed in the Finell Report*, is substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ”, each of which embodies a respective 26-note melody that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. In addition, “La paz” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

“If Thou But Suffer God to Guide Thee”

78. A transcription of “If Thou But Suffer God to Guide Thee” (hereafter, “If Thou”) is on Page 21 of the Finell Report. As seen therein, Phrase 2 (a green box), is missing. The scale degree numbers in the red (Phrase 1) box show a similarity to Phrase 1 in “Emmanuel” and “Christ” in which 7 pitches match, not 9 pitches that match between Phrase 1 of “Emmanuel” and “Christ”. This is shown in the chart immediately below using transcriptions in the Finell Report. (As noted in the Finell Report, intervening differing scale degrees are shown in brackets.)

“If Thou” (bars 1-4):	5-1-2-3-2-1[-2-#7]- 5
“Emmanuel” (bars 1-4):	5-1-2-3-2-1-7-1-[2]-5
“Christ” (bars 1-4):	5-1-2-3-2-1-7-1- 5

79. Notably, scale degree 7 is raised in “If Thou” but, scale degree 7 is lowered in the 12-bar melodies at issue in “Emmanuel” and “Christ”. The melodies at

issue in “Emmanuel” and “Christ” (in the Verses) do not have any raised seventh scale degree and a raised seventh scale degree has a very different melodic function from a lowered scale degree 7 as explained (with citations) above. Thus, the raised scale degree 7 in the melody of “If Thou” represents a difference from the melodies at issue in “Emmanuel” and “Christ”.

80. The opening phrase in “If Thou” is not followed by Phrase 2 (a **green** box). Unlike the consecutive melodic structure and development in “Emmanuel” and “Christ”, the melody in bars 5-9 of “If Thou” is very different from any melodic expression at issue in “Emmanuel” and “Christ”.

81. The purported Phrase 3 in the **blue** box in “If Thou” is an isolated, cherry-picked fragment as compared with Phrase 3 in “Emmanuel” and “Christ”. Using the scale degree numbers of Phrase 3 in “Emmanuel” and “Christ” charted in Paragraph 4 on Page 3 of the Finell Report and the transcription of the purported Phrase 3 in the **blue** box in “If Thou” as transcribed on Page 21 of the Finell Report, corresponding scale degrees are charted below. Corresponding pitches that are on the same scale degree are highlighted in **red**. (As noted in the Finell Report, intervening differing scale degrees are shown in brackets.)

“If Thou” (bars 10-12): 5- **5- 4-4-3**

“Emmanuel” (bars 9-11): **6-[5]-4-3-4-5-3**

“Christ” (bars 10-12): **6- 4-3-4-5-3**

As shown above, the highest note in Phrase 3 in “Emmanuel” and “Christ” on scale degree 6 is missing in the boxed melody in “If Thou”. The similarity in scale degrees is not nearly as great in “If Thou” as it is between Phrase 3 in “Emmanuel” and “Christ”.

82. Moreover, the purported **blue** (Phrase 3) box in “If Thou” is not only fragmentary, it is isolated: it is preceded by 5 bars of melody and followed by 6 bars of melody that differ from any melodic expression at issue in “Emmanuel” and “Christ”. As transcribed in the Finell Report, the consecutive and contiguous melodic phrase structure and melodic development from Phrase 1 to Phrase 2 to Phrase 3 shared in

“Emmanuel” and “Christ” is absent in “If Thou”. The minimal analysis on Page 21 is limited to (the weak similarity in) scale degrees.

83. On the basis of my analysis above, I found that the melodic expression (including the melodic phrase structure and the melodic development) in “If Thou”, as *transcribed and boxed in the Finell Report*, is substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ”, each of which embodies a respective 26-note melody that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. In addition, “If Thou” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ”.

“At the Name of Jesus”

84. A transcription of “At the Name of Jesus” (hereafter, “At the Name”) is on Page 22 of the Finell Report. As seen therein, Phrase 3 (a blue box), is missing. Moreover, the green box (Phrase 2) overlaps with the red box (Phrase 1). These melodic phrases are not consecutive and they are not autonomous, although the Finell Report attempts to make them seem so. That attempt is deeply flawed. Rather, the cherry-picked green boxed Phrase 2 and the dovetailed red boxed (Phrase 1) are substantially different in melodic phrase structure and melodic development as compared with the consecutive and autonomous Phrases 1 and 2 in “Emmanuel” and “Christ”.

85. As noted above, only bars 1-4 of the score I found are included in the transcription of “At the Name” on page 22 of the Finell Report. The melody in the subsequent 13 bars (bars 5-16) is omitted in the Finell Report without any explanation.

86. On the basis of my analysis above, I found that the melodic expression (including the melodic phrase structure and melodic development) in “At the Name”, as *transcribed and boxed in the Finell Report*, is substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ”, each of which embodies a respective 26-note melody that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic

development. In addition, “At the Name” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ”.

“All On the Dawns”

87. A transcription of “All On the Dawns” (hereafter, “Dawns”) is on Page 23 of the Finell Report. As seen therein, Phrase 2 (a green box) and Phrase 3 (a blue box) are missing. Only a red box (Phrase 1) is included. As noted above, the Finell Report failed to provide the source of its 4-bar excerpt. In the source of that I found on “themefinder.org”, the excerpt is 6 bars long. The Finell Report not only failed to provide its source, it also failed to explain why it omitted the melody that continues after the 4 bars in its transcription of “Dawns”.

88. In the narrative on Page 23, the Finell Report concedes that scale degree 7 in “Dawns” is raised. The melodies at issue in “Emmanuel” and “Christ” (in the Verses) do not have any raised seventh scale degree. Indeed, a raised seventh scale degree has a very different melodic function from a lowered scale degree 7 as explained (with citations) above. Thus, the raised scale degree 7 in the melody of “Dawns” represents a difference from the melodies at issue in “Emmanuel” and “Christ”.

89. On the basis of my musicological analysis above, I found that the melodic content in the excerpt on Page 23 of the Finell Report of “Dawns” does not remotely embody the significant melodic similarities developed within three consecutive melodic phrases in 12 bars shared by “Emmanuel” and “Christ”. The melody in “Dawns”, as *transcribed in the Finell Report*, with its notably different raised scale degree 7, is far below the significant melodic similarities shared between “Emmanuel” and “Christ”. Indeed, “Emmanuel” and “Christ” each embody a respective 26-note melody that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. In addition, “Dawns” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

“Take Up Your Cross”

90. A transcription of “Take Up Your Cross” (hereafter, “Your Cross”) is on Page 24 of the Finell Report. As seen therein, Phrase 2 (a green box) and Phrase 3 (a blue box) are missing. Only a red box (Phrase 1) is included. As boxed in the Finell Report, the melodic similarity is limited to bar 1. The melody in the remaining 7 bars is not boxed or analyzed on Page 24 of the Finell Report.

91. In the narrative on Page 24, the Finell Report concedes that scale degree 7 in “Your Cross” is raised. As explained and cited above, there is no raised scale degree 7 in the melodies at issue in “Emmanuel” and “Christ” and the use of a raised scale degree 7 in the melody in “Your Cross” represents a difference in pitch and function as compared with the melodies at issue in “Emmanuel” and “Christ”.

92. The Finell Report omits an analysis of the meter and rhythmic durations which are substantially different in the red boxed Phrase 1 in “Your Cross” as compared with melodic Phrase 1 in “Emmanuel” and “Christ”. The meter is 4/4 in “Your Cross” but it is 3/4 in “Emmanuel” and “Christ”. Moreover, the repeating rhythmic durations of two eighth notes followed by a quarter note in the red boxed Phrase 1 in “Your Cross” is completely absent in melodic Phrase 1 in “Emmanuel” and “Christ”.

93. In addition, the end of the red boxed Phrase 1 in “Your Cross” is clearly not the end of the melodic phrase which continues into bar 2. Thus, the red boxed Phrase 1 in “Your Cross” is artificial and omits the continuing melodic phrase in “Your Cross” *as transcribed in the Finell Report*.

94. On the basis of my musicological analysis above, I found that the melodic excerpt of “Your Cross” on Page 24 of the Finell Report does not remotely embody the significant melodic similarities shared by “Emmanuel” and “Christ”. The melody in “Your Cross”, with its notably different raised scale degree 7, is far below the aggregate of similarities shared between “Emmanuel” and “Christ”. As shown in the transcriptions of “Emmanuel” and “Christ” in the Finell Report, “Emmanuel” and “Christ” each embody a respective 26-note melody that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development.

In addition, “Your Cross” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

“Fare Ye Well, Lovely Nancy”

95. A transcription of “Fare Ye Well, Lovely Nancy” (hereafter, “Fare Ye Well”) is on Page 25 of the Finell Report. As seen therein, Phrase 2 (a green box) and Phrase 3 (a blue box) are missing. Only a red box (Phrase 1) is included. As boxed in the Finell Report, the melodic similarity is limited to bars 1 and 2. The melody in the remaining 14 bars is not boxed or analyzed on Page 25 of the Finell Report.

96. The end of the red boxed Phrase 1 in “Fare Ye Well” (through beat 2 of bar 2) is clearly not the end of the melodic phrase which continues through beat 2 of bar 4. Thus, the red boxed Phrase 1 in “Fare Ye Well” is artificial and omits the continuing melodic phrase in “Fare Ye Well”.

97. The Finell Report omits an analysis of the rhythmic durations which are different in the red boxed Phrase 1 in “Fare Ye Well” as compared with melodic Phrase 1 in “Emmanuel” and “Christ”. The repeated rhythmic durations of a dotted eighth note followed by a sixteenth note in the red boxed Phrase 1 in “Fare Ye Well” (repeated several more times in the remaining bars) are completely absent in melodic Phrase 1 in “Emmanuel” and “Christ”.

98. On the basis of my musicological analysis above, I found that the melodic excerpt of “Fare Ye Well” on Page 25 of the Finell Report does not remotely embody the significant melodic similarities shared by “Emmanuel” and “Christ”. The limited melody in the “Fare Ye Well” excerpt, with a notably different repeating rhythmic duration figure, is far below the melodic similarities shared by “Emmanuel” and “Christ” and is substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ” that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. In addition, “Fare Ye Well” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

“Black-Eyed Susan”

99. A transcription of “Black-Eyed Susan” (hereafter, “Susan”) is on Page 26 of the Finell Report. As seen therein, Phrase 2 (a green box) and Phrase 3 (a blue box) are missing. Only a red box (Phrase 1) is included. As boxed in the Finell Report, the melodic similarity is limited bars 1 and 2. As noted above, the score on Page 13 of the 18-page PDF article I found (attached in **Rebuttal Report Visual Exhibit B**) consists of 14 bars. The transcription of “Susan” on Page 26 of the Finell Report omits the melody in 12 bars (bars 3-14) of “Susan” without any explanation.

100. The Finell Report omits an analysis of the rhythmic durations which are different in the red boxed Phrase 1 in “Susan” as compared with melodic Phrase 1 in “Emmanuel” and “Christ”. The rhythmic durations of two sixteenth notes followed by an eighth note in the transcription in the Finell Report (and repeated 3 more times in the remaining bars of the full “Susan” song omitted in the Finell Report but attached in **Rebuttal Report Visual Exhibit B**) are completely absent in melodic Phrase 1 in “Emmanuel” and “Christ”.

101. In the narrative regarding “Susan” at the top of Page 26 and contrary to earlier narratives, the Finell Report fails to identify the fact that scale degree 7 in “Susan” is raised. As explained and cited above, there is no raised scale degree 7 in the melodies at issue in “Emmanuel” and “Christ” and the use of a raised scale degree 7 in the melody in “Your Cross” represents a difference in pitch and function as compared with the melodies at issue in “Emmanuel” and “Christ”.

102. On the basis of my musicological analysis above, I found that the melodic excerpt of “Susan” on Page 26 of the Finell Report does not remotely embody the significant melodic similarities developed within three consecutive melodic phrases in 12 bars shared by “Emmanuel” and “Christ”. The limited melody in the “Susan” excerpt with a notably different rhythmic duration figure and a different raised scale degree 7 is far below the melodic similarities shared by “Emmanuel” and “Christ” shown above. In addition, “Susan” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

“O Holy Spirit, Comforter”

103. A transcription of “O Holy Spirit, Comforter” (hereafter, “O Holy Spirit”) is on Page 26 of the Finell Report. As seen therein, Phrase 2 (a green box) and Phrase 3 (a blue box) are missing. Only a red box (Phrase 1) is included. As boxed in the Finell Report, the melodic similarity is limited bars 1 and 2. The remaining 10 bars are not boxed and not analyzed in the brief narrative in the Finell Report.

104. The Finell Report omits an analysis of the different meter (4/4) in the boxed portion of “O Holy Spirit”. “Emmanuel” and “Christ” are in 3/4, not 4/4 meter. Moreover, the Finell Report omits any mention of the changing meters, from 4/4 to 5/4 to 4/4 as transcribed on Page 26 thereof and which is very different from the consistent 3/4 meter in the Verses of “Emmanuel” and “Christ”.

105. On the basis of my musicological analysis above, I found that the melodic excerpt of “O Holy Spirit” on Page 26 of the Finell Report does not remotely embody the significant melodic similarities shared by “Emmanuel” and “Christ”. The limited boxed melody in “O Holy Spirit” is far below the very significant melodic similarities shared by “Emmanuel” and “Christ” that span three consecutive melodic phrases in 12 bars and that include exceedingly similar melodic phrase structures and melodic development. In addition, “O Holy Spirit” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ”.

“The Huron Carol”

106. A transcription of “The Huron Carol” (hereafter, “Huron”) is on Page 27 of the Finell Report. As seen therein, Phrase 1 (a red box) and Phrase 3 (a blue box) are missing. Only a purported Phrase 2 (a green box) is included. As boxed in the Finell Report, the melodic similarity is limited bars 1 and 2. The subsequent 16 bars are not boxed and not analyzed in the brief narrative in the Finell Report.

107. The Finell Report omits an analysis of the different meter (2/4) in “Huron”. “Emmanuel” and “Christ” are in 3/4, not 2/4 meter.

108. Moreover, the end of the green boxed Phrase 2 in “Huron” is clearly not the end of the melodic phrase which continues through beat 1 of bar 4. Thus, the green boxed Phrase 2 in “Your Cross” is artificial and omits the continuing melodic phrase in “Your Cross” *as transcribed in the Finell Report*.

109. In addition, the green boxed portion of an incomplete melodic phrase is not “Phrase 2” in “Huron”. The green boxed portion is the opening melody in “Huron”. Thus, this artificial and partial melodic phrase is different in its structural placement in “Huron” as compared with melodic Phrase 2 in “Emmanuel” and “Christ” wherein Phrase 2 is the second phrase that consecutively follows Phrase 1 and consecutively precedes Phrase 3. By way of difference, the purported green boxed Phrase 2 is not only incomplete, it is not Phrase 2 of “Huron” at all.

110. On the basis of my musicological analysis, I found that the boxed excerpt of “Huron” on Page 27 of the Finell Report does not remotely embody the significant melodic similarities shared by “Emmanuel” and “Christ”. The limited boxed melody in the “Huron” is in a different meter, artificially cuts off the last 6 notes of the continuing melody, and is not Phrase 2 of “Huron” at all. This weak prior art work example is far below the very significant melodic similarities shared by “Emmanuel” and “Christ” that span three consecutive melodic phrases in 12 bars and that include exceedingly similar melodic phrase structures and melodic development. In addition, “Huron” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ”.

#### “Farewell, Ungrateful Traitor”

111. A transcription of “Farewell, Ungrateful Traitor” (hereafter, “Fairwell”) is on Page 27 of the Finell Report. As seen therein, Phrase 1 (a red box) and Phrase 2 (a green box) are missing. Only a purported Phrase 3 (a blue box) is included. As boxed in the Finell Report, the melodic similarity is limited to bars 1 and 2. The subsequent bars are not boxed and not analyzed in the brief narrative in the Finell Report. Moreover, the Finell Report fails to provide a score of the complete song “Farewell”.

112. The Finell Report omits an analysis of the different meter (“cut time”) in “Farewell”; “Emmanuel” and “Christ” are in 3/4, not in “cut time” which has two, not three

beats per bar. Indeed, the analysis in the Finell Report is limited to a single sentence: “One phrase contains 7 scale degrees in common with phrase 3 of “Emmanuel”. [Finell Report, ¶m., p. 27]

113. As shown in the “Farewell” transcription on Page 27 of the Finell Report, the blue boxed portion is not “Phrase 3” of the melodic excerpt. The blue boxed portion is the opening melody in “Farewell”. Thus, this melodic phrase is different in its structural placement in “Farewell” as compared with melodic Phrase 3 in “Emmanuel” and “Christ” wherein Phrase 3 is consecutively preceded by Phrase 2 which, in turn, is consecutively preceded by Phrase 1. Thus, by way of difference, the purported green boxed Phrase 3 is not Phrase 3 of “Farewell” at all.

114. On the basis of my musicological analysis above, I found that the melodic excerpt of “Farewell” on Page 27 of the Finell Report does not remotely embody the significant melodic similarities shared by “Emmanuel” and “Christ”. The limited boxed melody in the “Farewell” is in a different meter and is not Phrase 3 of “Farewell” at all. This weak prior art work example is far below the very significant melodic similarities shared by “Emmanuel” and “Christ” that span three consecutive melodic phrases in 12 bars and that include exceedingly similar melodic phrase structures and melodic development. In addition, “Farewell” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

#### “The God of Abraham”

115. A transcription of “The God of Abraham” (hereafter, “Abraham”) is on Page 28 of the Finell Report. As seen therein, Phrase 2 (a green box) and Phrase 3 (a blue box) are missing. Only a red box (Phrase 1) is included. As boxed in the Finell Report, the melodic similarity is limited to 4 notes in bar 1 (including the upbeat). The melody in the remaining 3 bars is not boxed or analyzed on Page 28 of the Finell Report.

116. As noted above, the Finell Report failed to provide direct online links or PDFs of the scores of the prior art works that it presents. The score of “Abraham” that I found has doubled note values as compared with the Finell Report. Moreover, the

Finell Report only includes a transcription of the melody in bars 1-4 of the score I found. The Finell Report omits the melody in bars 5-16 (plus a final bar sung to “Amen”) without any explanation. The full score of “Abraham” that I found is attached in **Rebuttal Report Visual Exhibit B**.

117. The end of the red boxed Phrase 1 in “Abraham” (through beat 3 of bar 1) is clearly not the end of the melodic phrase which continues through beat 3 of bar 2. Thus, the red boxed Phrase 1 in “Abraham” is artificial and omits the continuing melodic phrase in “Abraham”.

118. The Finell Report omits an analysis of the different meter in “Abraham” which is 4/4, not the 3/4 meter in “Emmanuel” and “Christ”.

119. Within this context of differences, the similarity between the melody in “Abraham” as transcribed and analyzed on Page 28 of the Finell Report and the melodies at issue in “Emmanuel” and “Christ” is a minimal 4 notes as charted immediately below.

“Abraham” (bar 1):	5-1-2-3 –[4...]
“Emmanuel” (bars 1-4):	5-1-2-3-2-1-7-1-[2]-5
“Christ” (bars 1-4):	5-1-2-3-2-1-7-1- 5

Thus, the Finell Report finds this fragment of Phrase 1 in “Emmanuel” and “Christ” – wherein all 9 scale degrees in “Christ” match 9 out of 10 scale degree in “Emmanuel” – worthy of presentation. In fact, “Abraham” is just one more example of the paucity of prior art in the Finell Report.

120. On the basis of my musicological analysis above, I found that the melodic excerpt of “Abraham” on Page 28 of the Finell Report does not remotely embody the significant melodic similarities shared by “Emmanuel” and “Christ”. The strained and fragmentary melodic similarity in the “Abraham” excerpt is far below the melodic similarities shared by “Emmanuel” and “Christ” and is substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ” that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar

melodic phrase structures and melodic development. In addition, “Abraham” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

“O God of Every Nation”

121. A transcription of “O God of Every Nation” (hereafter, “O God”) is on Page 28 of the Finell Report. As seen therein, Phrase 2 (a green box) and Phrase 3 (a blue box) are missing. Only a red box (Phrase 1) is included. As noted above, the Finell Report only includes a transcription of the melody in bars 1-2 of the score I found. The Finell Report omits bars 3-16 of “O God” without any explanation. The full score of “O God” that I found is attached in **Rebuttal Report Visual Exhibit B**.

122. The Finell Report omits an analysis of the different meter in “O God” which is 4/4, not the 3/4 meter in “Emmanuel” and “Christ”.

123. Within this context of a different meter and the omission of a substantial part of “O God” (14 of a total of 16 bars of “O God” are omitted in the Finell Report), the similarity between the melody in “O God” as transcribed and analyzed on Page 28 of the Finell Report and the melodies at issue in “Emmanuel” and “Christ” is fragmentary and unremarkable as charted immediately below.

“O God” (bars 1-2):           5-1-[1] 2-[1]-3-2-1-[1]

“Emmanuel” (bars 1-4):   5-1-2-3-2-1-7-1-[2]-5

“Christ” (bars 1-4):       5-1-2-3-2-1-7-1- 5

Thus, while all 9 scale degrees in “Christ” match 9 out of 10 scale degrees in “Emmanuel”, *as transcribed and charted in the Finell Report*, the Finell Report finds that this fragmented and unremarkable part of Phrase 1 in “O God” is worthy of presentation. In fact, “O God” is yet another example of the weak prior art in the Finell Report.

124. On the basis of my musicological analysis above, I found that the melodic excerpt of “O God” on Page 28 of the Finell Report does not remotely embody the significant melodic similarities shared by “Emmanuel” and “Christ”. The weak and fragmentary melodic similarity in the “O God” excerpt is far below the melodic

similarities shared by “Emmanuel” and “Christ” and is substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ” that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. In addition, “O God” does not remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ” *as transcribed in the Finell Report*.

THE “CONCLUSIONS” TO PART 2 OF THE FINELL REPORT REFLECT A MISLEADING AND INCOMPLETE ANALYSIS OF “EMMANUEL” AND “CHRIST” AND A FLAWED ANALYSIS OF PRIOR ART

125. The “Conclusions” to Part 2 on Page 29 of the Finell Report continue the misleading and incomplete analysis of “Emmanuel” and “Christ” in Part 1. In fact, every prior art work presented in the Finell Report embodies substantially less similarity to either “Emmanuel” or “Christ” than the very significantly similar melodic expression shared by “Emmanuel” and “Christ” that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. Moreover, none of the prior art works even remotely embody the aggregate of (23) similarities shared by “Emmanuel” and “Christ”.

126. In Paragraph 28 in its Conclusions to Part 2, the Finell Report states:

“Further, works long within the public domain have been identified as comprising phrases containing as high a degree of melodic similarity (pitch, duration, and metrical positioning) to ‘Emmanuel’ as does ‘Christ’ to ‘Emmanuel’.” [Finell Report, ¶28, p. 29]

Contrarily and as shown above, the analysis of prior art in the Finell Report was almost wholly reduced to the analysis of “pitch” as scale degrees. “Metrical positioning” was never mentioned in any analysis of the 15 prior art works. Only in the analysis of “All On the Dawns” on Page 23, does the Finell Report identify “duration”. Thus, in 14 out of 15 prior art works analyses, the Finell Report does not mention “duration” and in all 15 prior art works analyses the Finell Report does not mention “metrical positioning”.

Those objective facts not only hollow out the “Conclusion” cited immediately above, they falsify that cited “Conclusion”.

127. Moreover, as demonstrated above, the Finell Report’s analysis of prior art omitted any comparative analysis of the melodic development in the prior art melodies as compared with the exceedingly similar melodic development that spans three consecutive melodic phrases in 12 bars in “Emmanuel” and “Christ”.

128. As also shown above, in its definition of melody and in its method of analysis of the melodies at issue in “Emmanuel” and “Christ”, the Finell Report compared (1) pitch, (2) rhythm (i.e., rhythmic duration), and (3) metrical placement but with respect to prior art and by way of self-contradiction, the method of analysis was reduced to a single element, pitch (i.e., scale degrees) alone in 14 out of 15 analyses. Thus, contrary to the Finell Report’s analysis of “Emmanuel” and “Christ”, in its presentation of prior art the threshold for the analysis of similarities was greatly reduced with no mention of “metrical positioning” in any of the 15 prior art analyses, and no mention of “duration” in 14 of the 15 prior art analyses.

129. In the final paragraph of the Conclusions to Part 2, the Finell Report states the following.

“The abundant prior musical works found thus far have demonstrated undeniably that the similarities between ‘Emmanuel’ and ‘Christ’ are no greater than those within prior art.” [Finell Report, ¶31, p. 29]

However, as shown above, the Finell Report failed to properly analyze “Emmanuel” and “Christ”, omitting the analysis (and even the recognition) of the importance of the three consecutive and contiguous melodic phrases and their development over 12 bars in “Emmanuel” and “Christ”. Moreover, the Finell Report contradicted and reduced its own inadequate analytical method used to analyze “Emmanuel” and “Christ” in its analysis of prior art.

130. As shown above, the Finell Report's analysis of prior art is dislocated, self-contradictory, and misleading. The Finell Report cannot escape from its own transcriptions. Thereby, the citation from Paragraph 31 above has no musicological basis and is objectively disproven by (1) the exceedingly strong melodic similarities between "Emmanuel" and "Christ" and (2) the narrowly conceived and weak similarities in prior art, *as transcribed in the Finell Report*.

## **II. C. THE FINELL REPORT: "PART 3", REBUTTAL OF THE FERRARA PRELIMINARY REPORT**

### **THE FINELL REPORT MISCHARACTERIZES THE FERRARA PRELIMINARY REPORT**

131. Part 3 of the Finell Report (Pages 30-39) is a rebuttal of the Ferrara Preliminary Report. The Finell Report claims that the Ferrara Preliminary Report "shows no similarity of original features between 'Christ' and 'Emmanuel'." [Finell Report, ¶34.b, p. 31]. However, as an initial matter and as shown above, in Part 1 (Pages 1-11) the Finell Report failed to properly analyze "Emmanuel" and "Christ" by using a flawed method and the obfuscation of objectively significant similarities and, in Part 2 (Pages 12-29), the Finell Report contradicted its own flawed method in its Part 1 with an even more limited and flawed method of analysis and the attempted obfuscation of the paucity of its prior art. Thus, as detailed above in this Rebuttal Report, Part 3 of the Finell Report must be reviewed within the context of flawed analyses of "Emmanuel" and "Christ" (in Part 1) and of prior art (in Part 2).

132. The Finell Report claims that the Ferrara Preliminary Report "has identified no new nor distinctive similarities beyond my own analytical findings." [Finell Report, ¶34.c.ii, p. 31]. However, as shown in the Ferrara Preliminary Report and above (using the Finell Report's own transcriptions), the similarities between "Emmanuel" and "Christ" far outweigh those proffered in prior art. The Ferrara Preliminary Report identifies melodic similarities between "Emmanuel" and "Christ" that are objectively much greater than any similarities in prior art proffered in the Finell Report. Not able to refute the very significant similarities at issue as presented in the

Ferrara Preliminary Report, Part 3 of the Finell Report uses mischaracterization and misrepresentation of the analyses in the Ferrara Preliminary Report. Indeed, as shown above, the Finell Report obscures the similarities between “Emmanuel” and “Christ” and presents prior art that is demonstrably weaker and falls far short of the very significant melodic similarities shared by “Emmanuel” and “Christ”. As shown above, the Finell Report’s prior art works do not remotely embody the melodic similarities shown in the Ferrara Preliminary Report.

133. Regarding the “distinction in duration, metrical positioning, and specific pitches” [Finell Report, ¶34c.iii, p. 31], similarities in pitch, rhythmic duration, melodic phrase structure, and melodic development – as analyzed and transcribed in the Ferrara Preliminary Report and *as transcribed in the Finell Report* – establish very strong musicological evidence of copying expression that is not found in prior art.

134. These empirically verifiable melodic similarities shared by “Emmanuel” and “Christ” are grounded in the transcriptions in both the Ferrara Preliminary Report and the Finell Report. Thereby, these empirically verifiable melodic similarities obliterate the opinion in the Finell Report’s Paragraph 35 cited immediately below.

“Lawrence Ferrara’s opinion relies on the entirety of shared similarities, each of which I found abundantly within the public domain literature as **fundamental building blocks** of western music. [Finell Report, ¶35, p. 32, emphasis added]

Contrarily, 21 out of a total of 26 notes with the same pitches and 13 out of those 26 notes with the same rhythmic durations, and exceedingly similar melodic development such as the lowest and highest pitches in three consecutive melodic phrases over 12 bars of music is not, by any musicological measure, remotely a “fundamental building block of western music”. Rather, it represents very substantial melodic expression. That is to say, unlike 3/4 meter, the key of E minor, and Verse/Refrain form (which are musical building blocks), the very significant similarities shared by “Emmanuel” and “Christ” embody very substantial melodic expression. As evidenced in the prior art search in the Ferrara Preliminary Report and in the failed prior art section in the Finell

Report, those similarities in melodic expression are unique in “Emmanuel” and “Christ” and cannot possibly be characterized as “fundamental building blocks” (or ideas).

135. Regarding Paragraph 36 on Page 32 of the Finell Report, as an initial matter, the Ferrara Preliminary Report does not “dismiss[es] the refrain of ‘Christ’.” Using widely accepted musicological practices, the Ferrara Preliminary Report identifies the portions of each work that are at issue and the portions that are not. With respect to the Refrain of “Christ”, as the Ferrara Preliminary Report (at Paragraph 5 on Page 2) correctly states:

“The melodies at issue are (1) in the Verses in ‘Emmanuel’ and ‘Christ’, and (2) in the Refrain in ‘Emmanuel’. In ‘Emmanuel’, the melody in bars 9 – 16 of the Verse is varied and is the basis of the Refrain in ‘Emmanuel’. Therefore, the music in the Refrain of ‘Emmanuel’ is also at issue. On the other hand, the melody in the Refrain of ‘Christ’ is distinct from melody in the Verse of ‘Christ’. Therefore, the music in the Refrain of ‘Christ’ is not at issue.” [Ferrara Preliminary Report, ¶5, p. 2]

The Finell Report exaggerates and mischaracterizes the straightforward and musicologically accurate statement – namely, that “the music in the Refrain of ‘Christ’ is not at issue” – stating that “Lawrence Ferrara **dismisses** the refrain of “Christ....” [Emphasis added] The Ferrara Preliminary Report correctly states that the Refrain in “Christ” is not at issue as it has different musical material.

136. Moreover, the Finell Report generalizes in the same Paragraph 36 by opining:

“As with the majority of traditional songs, the refrain conveys the distinctive expression of the work containing its most recognizable material, rather than the verse. Consequently, as stated by Lawrence Ferrara himself, the most individualistic and distinctive sections of ‘Christ’ and ‘Emmanuel’ differ.” [Finell Report, ¶36, p. 32].

First, the Finell Report fails to presents any scholarly source or research regarding “the majority of traditional songs” that establish that “the refrain conveys the distinctive expression of the work containing its most recognizable material, rather than the verse.”

137. Second, the Finell Report fails to provide any substantive comparative analysis of the expression specifically in the Refrain as compared with the Verses of “Christ” that would support its hypothesis that “the refrain [in “Christ”] conveys the distinctive expression...containing its most recognizable material, rather than the verse”. Thus, the opinion in Paragraph 36 of the Finell Report cited above is merely conclusory and lacks any musicological evidence to support that opinion.

138. Third, the citation from Paragraph 5 of the Ferrara Preliminary Report cited above – namely, that “the melody in bars 9 – 16 of the Verse is varied and is the basis of the Refrain in ‘Emmanuel’” – establishes that the Verse in “Emmanuel”, which is at issue, is used as the “basis for the Refrain” in “Emmanuel”. This places the Refrain in “Emmanuel” at issue in addition to the Verse. Therefore, the Finell Report is demonstrably wrong when it finds, as cited above, “Consequently, as stated by Lawrence Ferrara himself, the most individualistic and distinctive sections of ‘Christ’ and ‘Emmanuel’ differ.” [Finell Report, ¶36, p. 32] To recap, in Paragraph 5 of the Ferrara Preliminary Report, I not only do not “dismiss” the Refrain of “Christ”, I do find that the Refrain in “Emmanuel” is at issue. Indeed, if one accepted the Finell Report’s own conclusory and undocumented criteria, the “most individualistic and distinctive” part of “Emmanuel” (the Refrain) has been copied by “Christ”. Far from dismissing the differences in the Refrain, the Ferrara Preliminary Report shows that the Verse and Refrain are at issue in “Emmanuel” which by the Finell Report’s definition means that that “Christ” has copied the “most individualistic and distinctive” part of “Emmanuel”. Thus, in its Paragraph 36, the Finell Report grossly misrepresents the Ferrara Preliminary Report and gets tangled in its own misrepresentations. Indeed, the misrepresentations in the Finell Report’s Paragraph 36 exposed above are paradigm examples of the misrepresentations and obfuscation that are rife throughout the Finell Report.

THE FERRARA PRELIMINARY REPORT'S METHODOLOGY IS INTERNALLY  
CONSISTENT AND FOLLOWS ACCEPTED MUSICOLOGICAL PRACTICES

139. In Paragraph 39 on Page 33, the Finell Report takes issue with the the Ferrara Preliminary Report's inclusion of the analysis of similarities in key, Verse/Refrain form, meter, and four-bar phrase structure in "Emmanuel" and "Christ". However, as analyzed in the Ferrara Preliminary Report, these elements are part of an aggregate of similarities that are shared by "Emmanuel" and "Christ". Moreover, it is unthinkable that any comparative musicological analysis of "Emmanuel" and "Christ" would omit the analysis of the key, meter, and the four-bar phrase structure. These are musical building blocks that are the same in "Emmanuel" and "Christ". Contrary to the misrepresentation in Paragraph 39 of the Finell Report, namely, that the Ferrara Preliminary Report purportedly "**relied** on similarities in meter, key and form" [emphasis added], in keeping with musicological practices, the Ferrara Preliminary Report properly analyzed these elements in both works. The Ferrara Preliminary Report inclusion of these similarities is a far cry from "relying on" them, which implies that there was little else at issue. Contrary to Paragraph 39 in the Finell Report, the Ferrara Preliminary Report "**relied on**" the very significant melodic similarities in bars 1-12 of each Verse and the exceedingly similar melodic development in three consecutive melodic phrases that constitute the very long (26-note) respective melody in bars 1-12 of "Emmanuel" and in bars 1-12 of "Christ". Notably, as shown above, none of the prior art works in the Finell Report even remotely embody this very significant similarity in melodic expression shown in the Ferrara Preliminary Report and confirmed in the transcriptions in the Finell Report.

140. Paragraph 40 on Page 33 of the Finell Report is confused and self-contradictory. As an initial matter, the first sentence in Paragraph 40 of the Finell Report is conclusory and illusory. The Ferrara Preliminary Report does not "trivialize" "metrical positioning" and "rhythmic" durations. The Finell Report fails to provide any evidence of "trivializing" of metrical positioning and rhythmic durations in the Ferrara Preliminary Report. Thus, this statement in the Finell Report is merely conclusory and lacks any musicological evidence.

141. In its second sentence of Paragraph 40, the Finell Report moves from “trivializes” to a purported “contradict[ion]” in the Ferrara Preliminary Report regarding “metrical positioning”. However, the analyses in the Ferrara Preliminary Report regarding “metrical positioning” (also termed “metrical placement”) are consistent and remotely self-contradictory as cited and shown immediately below.

- (1) Regarding metrical placement in melodic Phrase 1, the Ferrara Preliminary Report accurately finds that “the metrical placement is not the same”. [Ferrara Preliminary Report, ¶10, p. 4]
- (2) Regarding metrical placement in melodic Phrase 2, the Ferrara Preliminary Report accurately finds that “the metrical placement is not the same”. [Ferrara Preliminary Report, ¶14, p. 5]
- (3) Regarding metrical placement in melodic Phrase 3, the Ferrara Preliminary Report accurately finds that “the metrical placement of five of the last six pitches in ‘Christ’ is the same as in corresponding pitches connected by dotted lines in ‘Emmanuel’”. [Ferrara Preliminary Report, ¶18, p. 7]

Thus, the Ferrara Preliminary Report accurately and consistently analyzes the metrical placements in melodic Phrases 1 and 2 (in which the metrical placements are “not the same”) and in melodic Phrase 3 (in which “the metrical placement of five of the last six pitches in ‘Christ’ is the same as in corresponding pitches ... in ‘Emmanuel’.”) There is no inconsistency in the analytical method used to analyze the metrical positioning in the Ferrara Preliminary Report. Rather, the Finell Report confuses the objective differences in metrical placements in Phrases 1 and 2 as compared with Phrase 3 as a “contradict[ion]” in the analysis of the metrical placements in those three melodic phrases. As clearly shown in the Ferrara Preliminary Report, there is no self-contradiction: the same method was used to objectively report on the metrical placements in all three Phrases. Thus, the Finell Report’s confusion regarding the results of the analysis of metrical positioning in the Ferrara Preliminary Report resulted in the Finell Report’s illusory and empty findings in Paragraph 40 on Page 33.

142. In Paragraph 41, the Finell Report opines that the Ferrara Preliminary Report “erroneously determines melodic similarity by mistakenly focusing primarily on only one of the 3 factors required for a finding of melodic similarity.” [Finell Report, ¶41, p. 34]. First, in keeping with widely accepted musicological practices, the Ferrara Preliminary Report analyzed multiple “factors” as evidenced immediately below:

- (1) overall structure was analyzed at ¶5, p. 2;
- (2) key was analyzed at ¶6, p. 2;
- (3) meter was analyzed at ¶6, p. 2;
- (4) melodic phrase structure was analyzed at ¶7, p. 2;
- (5) pitches as scale degrees were analyzed at ¶8, p. 3, ¶12, pp. 4-5, and ¶16, p. 6;
- (6) melodic range (highest and lowest pitches) was analyzed at ¶9, p. 3, ¶13, p. 5, and ¶17, p. 6;
- (7) metrical placement was analyzed at ¶10, p. 4, ¶14, p. 5, and ¶18, p. 7; and
- (8) rhythmic durations were analyzed at ¶10, p. 4, ¶14, p. 5, and ¶18, p. 7.

As shown immediately above, the Ferrara Preliminary Report demonstrably used at least eight “factors”, not “only one” “factors” in its analysis. In addition, in the analysis of melodies, standard musicological practices include the directly related analysis of the overall structure, key, and meter within which the melodies appear. Thus, Paragraph 41 of the Finell Report is demonstrably wrong when it finds that the Ferrara Preliminary Report “focus[es] primarily on only one of the 3 factors required for finding of melodic similarity”.

CONTRARY TO MUSICOLOGICAL SCHOLARSHIP AND PRACTICES, THE FINELL REPORT’S DEFINITION OF “MELODY” OMITTS MELODIC STRUCTURE AND DEVELOPMENT

143. As explained in Paragraphs 9-10 above, “melody” is a single line of music that consists primarily of a succession (i.e., a sequence or order) of pitches and the rhythmic durations of those pitches within a melodic phrase structure.<sup>13</sup> Notably, in the section, “Structure and Design”, in its entry on “Melody”, *The New Grove Dictionary of Music and Musicians* explains:

“The character of a given melody is determined by its range or relative position within the total pitch continuum, its ambitus or pitch spread, its contour or linear design, and its syntactic structure with respect to elements of contrast and repetition, variation and **development**”. [p. 364, bold font emphasis added]

144. The Finell Report’s definition of “melody” at Paragraph 3 on Page 2 and its reiteration at Paragraph 42 on Page 34 reduces melody to “pitch”, “duration”, and “metrical position” and thereby omits the importance of melodic structure and development. Thus, the Finell Report’s analysis of melody fails to include melodic development, and in particular in “Emmanuel” and “Christ”, the exceedingly similar development of very long and very similar respective 26-note melodies constituted of three consecutive and contiguous melodic phrases.

145. In Paragraph 43 on Page 34, the Finell Report asserts: “For a melodic series to be considered similar, a majority of” pitch, duration, and metrical placement “must be the same or similar for a reasonable series of notes”. [Finell Report, ¶43, p. 34] As an initial matter, the Finell Report fails to provide any scholarly source that supports that opinion. The unknown number of “a reasonable series of notes” or a percentage of a “majority” represent parts of this ungrounded and ambiguous opinion. Nonetheless, *as transcribed in the Finell Report*, 21 of 26 notes share the same pitches,

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5 See “Melody” in *The New Grove Dictionary of Music and Musicians*, pp. 363 – 373, and *The Harvard Dictionary of Music*, pp. 499 - 502.

13 of them share the same rhythmic durations, and additional melodic similarities such as the highest and lowest notes in melodic phrases and the exceedingly similar melodic development in three consecutive melodic phrases would satisfy any musicological definition of melodic “similarity”. Thus, the Finell Report’s hypothesis about the total number of notes and a percentage thereof that is necessary “to be considered similar” is an ungrounded smokescreen that diverts attention away from the exceedingly strong musicological evidence that supports a finding that, as shown in the Ferrara Preliminary Report and above in this rebuttal of the Finell Report, a significant amount of expression in “Christ” has been copied from “Emmanuel” and no prior art has been proffered that remotely embodies that melodic expression.

146. The last sentence in Paragraph 43 of the Finell Report is egregiously and demonstrably wrong. The Finell Report states:

“[M]any of my [the Finell Report’s] own findings from the literature are melodically more similar in these 3 factors [pitch, duration, and metrical position] to either ‘Emmanuel’ or ‘Christ’ than are ‘Emmanuel’ and ‘Christ’ to each other.” [Finell Report, ¶43,p. 34]

Notably, none of the prior art works in the Finell Report even remotely embodies the very significant melodic similarities between “Emmanuel” and “Christ”, as demonstrated above in this rebuttal report, and as empirically verified *as transcribed in the Finell Report*. Indeed, the Finell Report does not even mention “duration” in its analysis of 14 out of a total of 15 prior art works and does not mention “metrical position” at all in its analysis of all 15 prior art works. Thus, the citation from Paragraph 43 immediately above is demonstrably ungrounded and false.

THE FERRARA PRELIMINARY REPORT’S ANALYSES ARE CONSISTENT AND THE FINELL REPORT’S FINDING OF “INCONSISTENCIES” IS EASILY REFUTED

147. In Paragraph 44, the Finell Report states that the Ferrara Preliminary Report “finds similarity in shared series of pitches, while evading the differences that occur with intervening pitches.” [Finell Report, ¶44, p. 35] That statement is

demonstrably false. First, the connecting arrows in the Musical Examples in the Ferrara Preliminary Report show the “shared pitches” and thereby, also show the “intervening pitches”. (For example, see Musical Example 1 on Page 3 of the Ferrara Preliminary Report.) Second, the comparative scale degree charts in the Ferrara Preliminary Report use **bold** font to distinguish the “shared” from the “intervening” pitches as copied and demonstrated immediately below from Paragraph 8 on Page 3 of the Ferrara Preliminary Report.

“Emmanuel”:           **5 1 2 3 2 1 7 1 2 5**

“Christ”:               **5 1 2 3 2 1 7 1 5**

Thus, as transcribed in Musical Example 1 and charted on Page 3 of the Ferrara Preliminary Report, the “intervening” scale degree “2” in “Emmanuel” is clearly shown, which refutes the opinion in Paragraph 44 on Page 35 of the Finell Report that the Ferrara Preliminary Report “evad[es] the differences that occur with intervening pitches”.

148. In Paragraph 45a., the Finell Report continues its mistaken criticism regarding “intervening” pitches and conflates intervening pitches with its confusion about the analysis of highest and lowest pitches in the melodic phrases at issue. First, as cited in Paragraph 143 above, the “range” (i.e., highest and lowest pitches in a melody) is included in the citation from the *Grove* dictionary entry on “melody. Thus, identification of the highest and lowest pitches in a melody is appropriate in melodic analysis.

149. Second, not only is the Finell Report demonstrably wrong and misleading in its statement that the Ferrara Preliminary Report “evades” [Finell Report, ¶44] or “neglects” [Finell Report, ¶45a., p. 35] “intervening pitches”, the Finell Report conflates and confuses the analysis of melodic “range” (e.g., identifying the highest and lowest notes in melodies) with the purported but demonstrably false accusation as to the “denial of the musical importance” of intervening pitches. [Finell Report, ¶45a., p. 35] Indeed, the Finell Report cherry-picks pitches to obscure the full melodic phrase at issue and uses a smoke and mirrors methodology in its Paragraph 45(a.) to falsely

present that the Ferrara Preliminary Report “evades” and “neglects” intervening pitches as cited immediately below.

“[T]he last 4 notes of the first phrase of ‘Emmanuel’ (scale degrees 7-1-2-5) and the last 4 notes of the first phrase of ‘Christ’ (scale degrees 1-7-1-5) both end on a low scale degree 5 (the lowest point of the phrase), but the notes preceding this shared scale degree differ entirely – both in pitch and rhythm”. [Finell Report, ¶45.a, p. 35]

The analysis in the Finell Report cited immediately above omits and obscures the full melodic phrase and the overall similar pitches. When the scale degrees in the full melodic Phrase 1 are compared, the similarity is clear, despite the “intervening” scale degree 2 between scale degrees 1 and 5 at the end of “Emmanuel”. By isolating and cherry-picking the last 4 pitches of each melody, the Finell Report obscures the strong similarity between melodic Phrase 1 in bars 1-4 of “Christ” and “Emmanuel”. The chart shown immediately below is based on the Finell Report’s transcriptions and is consistent with a scale degree chart in Paragraph 4 on Page 2 of the Finell Report.

- a. “Emmanuel” (bars 1-4): **5-1-2-3-2-1-7-1-[2]-5**
- b. “Christ” (bars 1-4): **5-1-2-3-2-1-7-1- 5**

As one can readily see, out of a total of ten pitches in the Phrase 1 melody of “Emmanuel”, merely one pitch is an “intervening pitch”. The other nine pitches are the same and correspond with all nine pitches in the Phrase 1 melody of “Christ”. No amount of cherry-picking and smoke-and-mirrors analysis in its Paragraph 45a. on Page 35 can deny the Finell Report’s own transcriptions and chart in Paragraph 4 on Page 2. Thus, the citation above of the Finell Report’s misleading analysis is refuted by its own transcriptions and chart. Thus, contrary to the last sentence in Paragraph 45a. on Page 35 of the Finell Report – namely, that “Lawrence Ferrara erroneously applies a double standard here” – and as demonstrated above, (1) there is no “double standard” in the analysis of melodies in the Ferrara Preliminary Report but (2) there is a “double standard” and self-contradiction between the Finell Report’s transcriptions and charts in its analysis of “Emmanuel” and “Christ” and the cherry-picked and smoke-and-mirrors

analysis in its Paragraph 45a. cited above.

150. The Finell Report's smoke-and-mirrors method continues in Paragraph 45(b.) on Page 36. Therein, it presents that the last 4 scale degrees of Phrase 2 in "Christ" "[differ] substantially from 'Emmanuel'" [Finell Report, ¶45.b, p. 36]. However, the same faulty cherry-picking method exposed and refuted above has also been used here. When the scale degrees in the full melodic Phrase 2 are compared, their objective and obvious similarity is shown.

a. "Emmanuel" (bars 5-8): **5-1-2-3-4-[3]-[2]-1**

b. "Christ" (bars 5-8): **5-1-2-3-4-[2]-[7]-1**

As shown above, the first 5 pitches and the eighth pitch of Phrase 2 are identical in "Emmanuel" and "Christ". The Finell Report's smoke-and-mirrors method of analysis in Paragraph 45b. on Page 36 cannot deny its own transcriptions and chart in Paragraph 4 on Page 2 which are consistent with the charted scale degrees immediately above and in the Ferrara Preliminary Report. Thus, once again, the Finell Report's cherry-picking and smoke-and-mirrors method is revealed and refuted by its own earlier transcriptions and chart. The Finell Report's cherry-picking of the final 4 pitches without the context of the full melodic phrase is an attempt to obscure the obvious and objective similarity between the melodies at issue in "Emmanuel" and "Christ".

151. Moreover, by way of further refutation of Paragraph 45b. on Page 36 of the Finell Report, the Ferrara Preliminary Report presents comparative scale degree charts that use **bold** font to distinguish the "shared" from the "intervening" pitches in melodic Phrase 2 (bars 5-8) of "Emmanuel" and "Christ" in Paragraph 12 on Pages 4-5, copied immediately below.

"Emmanuel": **5 1 2 3 4 3 2 1**

"Christ": **5 1 2 3 4 2 7 1**

Here again, the Finell Report's narrative in Paragraph 45b. on Page 36 is a gross misrepresentation of the analyses and charts in the Ferrara Preliminary Report which not only identify "intervening pitches" by the absence of **bold** font thereof, but which are

consistent with the charted pitches in Paragraph 4 of the Finell Report.

152. Further, contrary to the last sentence in Paragraph 45b. of the Finell Report, the Ferrara Preliminary Report does not “dismiss” the “intervening pitches”. The Finell Report fails to show any such dismissal. Indeed, the Ferrara Preliminary Report acknowledges these intervening pitches in Phrases 1 and 2 in both of its musical examples and scale degree analyses (see the Ferrara Preliminary Report, Musical Examples 1 and 2, and ¶’s 8 and 12). As shown above, the misrepresentation of the findings in the Ferrara Preliminary Report as an “unreliable conclusion” that are “faulty due to the erroneous dismissal of crucial intervening pitches” is demonstrably wrong and grossly misleading. The Finell Report makes an effort to discredit the findings of the Ferrara Preliminary Report, but this effort is undone by the Finell Report’s own transcriptions and the objective similarities between the melodies at issue.

#### THE FINELL REPORT’S ANALYSIS OF INTERVENING PITCHES IS SELF-CONTRADICTIONARY IN ITS OWN ANALYSIS OF PRIOR ART

153. While the Finell Report attempts to falsely discredit the Ferrara Preliminary Report’s alleged dismissal of “intervening notes” (falsely stating that the Ferrara Preliminary Report “evades” [Finell Report, ¶44] or “neglects” [Finell Report, ¶45a.] “intervening pitches”), it is astonishing that in the entirety of Part 2 (Pages 12-29) regarding prior art, the Finell Report never uses the term “intervening pitches”. In a disabling self-contradiction, the Finell Report’s obsession with “intervening pitches” in its Part 3 rebuttal of the Ferrara Preliminary Report is completely absent in its Part 2 analysis of fifteen prior art works. Moreover, *as transcribed in the Finell Report*, its fifteen prior art works contain melodies with substantially more “intervening pitches” than between the melodies at issue in “Emmanuel” and “Christ”. Thus, in its analyses of fifteen prior art works in its Part 2, the Finell Report never mentions what, in its rebuttal of the Ferrara Preliminary Report, it calls “crucial intervening pitches”. [Finell Report, ¶45b., p. 36] The Finell Report is rife with such examples of misrepresentation and self-contradiction.

154. By way of example, let's consider the three prior art works in Group A of Part 2 of the Finell Report that allegedly include Phrase 1, Phrase 2, and Phrase 3 at issue: "Consolation", "Enviado soy de Dios", and "Wakefield Jigg". As an initial matter, as shown in Paragraphs 62 – 73 above, the meager, fragmented, and cherry-picked alleged melodic phrases at issue in these three prior art works fall far below the very significantly similar melodic expression shared by "Emmanuel" and "Christ". Within that context of misrepresentation, self-contradiction, and demonstrably weak prior art, the presence of a significant number of "intervening pitches" in the prior art works in the Finell Report's Group A and the failure and self-contradiction in the Finell Report's analyses of these prior art work to even mention "intervening pitches" is exposed immediately below.

155. As shown on Page 17 of the Finell Report, "Consolation" has three intervening pitches on scale degrees **4-3-2** within the interrupted Phrase 1 as compared with "Christ". However, in its analysis of "Emmanuel" and "Christ" in Part 1 of the report, the Finell Report charts and transcribes only one (not three) intervening pitch on scale degree 2 within Phrase 1 of "Emmanuel" as compared with "Christ". In its analysis of "Consolation" on Page 17, the Finell Report never mentions "intervening pitches", let alone the fact that there are three intervening pitches in Phrase 1 in "Consolation" but only one intervening pitch in Phrase 1 of "Emmanuel" as compared with "Christ". Moreover, while Phrases 1, 2, and 3 of "Emmanuel" and "Christ" are consecutive and contiguous as transcribed in the Finell Report, there are four intervening pitches between Phrase 2 and Phrase 3 in "Consolation" (on scale degrees **5-3-4-5**). The Finell Report fails to mention the greater number of "intervening pitches" within and between phrases in "Consolation", and it fails to admit to the demonstrably far greater similarity in the melodic development of the (contiguous) melodic phrases shared by "Emmanuel" and "Christ" as compared with "Consolation".

156. As shown on Page 18 of the Finell Report, "Enviado soy de Dios" has fifteen intervening pitches on scale degrees **5-1-1-1-2-3-3-3-4-3-2-1-2-2-3** within its interrupted Phrase 1 as compared with "Christ". In its analysis of "Enviado soy de Dios" on Page 18, the Finell Report never mentions "intervening pitches", let alone the fact

that there are fifteen intervening pitches in Phrase 1 in “Enviado soy de Dios” but only one intervening pitch in Phrase 1 of “Emmanuel” as compared with “Christ”. Amazingly, there are an additional sixteen intervening notes within the interrupted Phrase 3 in “Enviado soy de Dios” but no mention of that fact in the Finell Report’s analysis of “Enviado soy de Dios”. Moreover, while Phrases 1, 2, and 3 of “Emmanuel” and “Christ” are consecutive and contiguous *as transcribed in Part 1 of the Finell Report*, there are three intervening notes between Phrase 1 and Phrase 2 (on scale degrees **5-1-1**) and eight intervening notes between Phrase 2 and Phrase 3 in “Enviado soy de Dios” (on scale degrees **2-2-3-2-1-#7-1-5**) as transcribed on Page 18 of the Finell Report. The Finell Report fails to admit to the excessively greater number of “intervening pitches” within and between phrases in “Enviado soy de Dios”, and it fails to admit to the far greater similarity in the melodic development of the (contiguous) melodic phrases shared by “Emmanuel” and “Christ” as compared with “Enviado soy de Dios”.

157. “Wakefield Jigg” has twenty-four intervening notes between Phrase 1 and Phrase 2 and eleven intervening notes between Phrase 2 and Phrase 3 *as transcribed and boxed on Page 19 of the Finell Report*. In its analysis of “Wakefield Jigg” on Page 19, the Finell Report never mentions “intervening pitches”. Moreover, the Finell Report fails to mention the much greater similarity in the melodic development of the melodic phrases in “Emmanuel” and “Christ”, wherein Phrases 1, 2, and 3 at issue are consecutive and contiguous, but not in “Wakefield Jigg”.

158. The huge number of “intervening pitches” in the Finell Report’s prior art and the complete omission of the analysis of “intervening pitches” in all fifteen prior art works in Part 2 of that report demonstrate the self-contradictions and double standard of analysis applied in the Finell Report. The Finell Report’s misleading and demonstrably false focus on “crucial intervening pitches” in its rebuttal of the Ferrara Preliminary Report is completely omitted in the Finell Report’s own analysis of prior art. Therein, as shown above, there are substantially more “intervening pitches” in the melodies in prior art than between “Emmanuel” and “Christ”, a fact that is never mentioned in the analyses of prior art in the Finell Report.

THE FERRARA PRELIMINARY REPORT DOES NOT “DENY” PRIOR ART, AND  
PRIOR ART IN THE FINELL REPORT FALLS FAR SHORT

159. Contrary to sub-heading “D.” on page 36 of the Finell Report, the Ferrara Preliminary Report does not “deny” prior art. In Paragraph 20 on Page 7 of the Ferrara Preliminary Report and consistent with widely accepted musicological practices, I noted that a preliminary prior art search was performed to ascertain “whether or not the *aggregate* of melodic similarities” between “Emmanuel” and “Christ” were in use prior to 1980, the copyright year of “Emmanuel”. As noted therein, while I found some prior art works that embody part of the pitch sequence in melodic Phrase 1:

“I did not find any compositions that embody the *aggregate* of melodic similarities in bars 1-12, including the melodic development of high notes respectively on scale degrees “3”, “4”, and “6” in each of the three 4-bar melodic phrases at issue.” [Ferrara Preliminary Report, ¶20, p. 7]

That is hardly a “denial” of prior art. Rather, it is a summary of findings in a preliminary search for prior art.

160. In Paragraph 46 on Page 36, the Finell Report states, “My [the Finell Report’s] own findings disagree”. However, as objectively shown in the Rebuttal of Part 2 of the Finell Report above, the Finell Report fails to proffer any prior art work that even remotely embodies the aggregate of melodic similarities shown in the Ferrara Preliminary Report.

161. Staying with Paragraph 46 on Page 36, in another example of misrepresentation and obfuscation regarding the “melodic” similarities that were the focus of the Ferrara Report’s prior art search, the Finell Report falsely conflates “fundamental musical building blocks that composers have used for over 4 centuries” – such as the key of E minor, 3/4 meter, and 4-bar phrases – with the very substantial amount of “melodic” expression that is shared by “Emmanuel” and “Christ” as shown in the Ferrara Preliminary Report. There is no doubt that melodic expression (1) in which 21 out of a total of 26 pitches are the same, (2) 13 of which also have the same rhythmic duration, and (3) in which there is exceedingly similar development of these

26-note melodies in three consecutive and contiguous melodic phrases cannot, by any musicological let alone commonsensical measure, be characterized as “fundamental musical building blocks that composers have used for over 4 centuries”. Indeed, the demonstrable paucity of the prior art in the Finell Report adds further support and confirmation of the finding in the Ferrara Preliminary Report that these “melodic” similarities were not found in prior art.

162. Moreover, the Finell Report ends its Paragraph 46 with the statement: “The numerous examples found in prior music show that Lawrence Ferrara did not sufficiently undertake a thorough prior art search” [Finell Report, ¶46, p. 36]. This is one of many examples of misrepresentation. The fact is that the Finell Report did not remotely identify prior art that embodies the very significant melodic similarities shared by “Emmanuel” and “Christ”. Thus, according to the last sentence in Paragraph 46 cited above, that failure of prior art in the Finell Report might mean that the Finell Report “did not sufficiently undertake a thorough prior art search”. Rather, the fact remains that the Finell Report did not even remotely identify prior art that embodies the very significant melodic similarities shared by “Emmanuel” and “Christ”. Thereby, the prior art in the Finell Report supports and confirms the findings regarding prior art in the Ferrara Preliminary Report.

163. Paragraph 47 on Pages 36-37 of the Finell Report compares the melodies in two of its prior art works, “Consolation” and “All On the Dawns”, with the melodic similarities between “Emmanuel” and “Christ”. In Paragraph 47a. regarding “Consolation”, the Finell Report merely states that this “hymn (1861) contains similarities to each of the 3 compared phrases of ‘Emmanuel’ and ‘Christ’.” [Finell Report, ¶47a., p. 36] However, that merely conclusory statement fails to provide any tripartite analysis of the melodies at issue in “Consolation”, “Emmanuel” and “Christ”. The earlier analysis of “Consolation” on Page 17 of the Finell Report adds little more. By contrast, the analysis in Paragraphs 62-65 above demonstrates that the overlapping and cherry-picked melodic phrases in “Consolation” *as transcribed and boxed in the Finell Report*, are substantially less similar than the very significantly similar melodic expression in “Emmanuel” and “Christ”. As shown in Paragraphs 62-65 above, the

melodic similarity in “Consolation” to “Emmanuel” or “Christ” is far below and not remotely as similar as between “Emmanuel” and “Christ”. This fact is visually confirmed by comparing the boxes around melodic Phrases 1, 2, and 3 in “Emmanuel” and “Christ” in Musical Examples 6 and 7 respectively on Pages 32 and 33 above with melodic Phrases 1, 2, and 3 in “Consolation” on Page 17 of the Finell Report and copied on Page 34 above. By any musicological or commonsensical measure, the exceedingly similar melodic development in three consecutive and contiguous melodic phrases in “Emmanuel” and “Christ” is substantially lacking in the overlapping and cherry-picked melodic phrases in “Consolation”, *as transcribed and boxed in the Finell Report*.

164. In Paragraph 47(b.) on Pages 36-37, the Finell Report finds that “All On the Dawns” “contains the entire series of 10 scale degrees of phrase 1 of ‘Emmanuel’.” However, as shown in Paragraph 87-89 above, the similarities between “All On the Dawns” and “Emmanuel” or “Christ” are far below and not remotely as similar as between “Emmanuel” and “Christ”. The transcription of “All On the Dawns” is on Page 23 of the Finell Report. As seen therein, Phrase 2 (a green box) and Phrase 3 (a blue box) are missing. That is, “All On the Dawns” does not include Phrases 2 or 3, *as transcribed in the Finell Report*. Only a red box (Phrase 1) is included in “All On the Dawns”. As noted above, the Finell Report failed to provide the source of its 4-bar excerpt. In the source of that I found on “themefinder.org”, the excerpt is 6 (not 4) bars long. The Finell Report not only failed to provide its source, it also failed to explain why it omitted the melody that continues after the 4 bars in its transcription of “All On the Dawns”. Moreover, in Paragraph 47b., the Finell Report concedes that scale degree 7 in “All On the Dawns” is raised. The melodies at issue in “Emmanuel” and “Christ” (in the Verses) do not have any raised seventh scale degree. A raised seventh scale degree has a very different melodic function from a lowered scale degree 7 as explained (with citations) above. Thus, the raised scale degree 7 in the melody of “All On the Dawns” represents a difference from the melodies at issue in “Emmanuel” and “Christ” in Phrase 1, and “All On the Dawns” *as transcribed in the Finell Report* does not include Phrase 2 or Phrase 3. Importantly, the exceedingly similar melodic phrase structure and melodic development over three consecutive and contiguous melodic

phrases is missing in “All On the Dawns” which, according to the Finell Report, does not include any similarity to Phrase 2 and Phrase 3 at issue in “Emmanuel” and “Christ”.

165. Therefore, the melodic content in the excerpt on Page 23 of the Finell Report of “All On the Dawns” does not even remotely embody the significant melodic similarities developed within three consecutive melodic phrases in 12 bars shared by “Emmanuel” and “Christ”. The melody in “All On the Dawns”, *as transcribed in the Finell Report*, with its notably different raised scale degree 7 and complete omission of melodic Phrases 2 and 3, is far below the significant melodic similarities shared between “Emmanuel” and “Christ”. It is preposterous for the Finell Report to imply that the single, isolated melodic phrase in “All On the Dawns”, the transcription of which omits all of the remaining music in “All On the Dawns”, is comparable to the substantial melodic expression that is shared by “Emmanuel” and “Christ”. Indeed, “Emmanuel” and “Christ” each embody a respective 26-note melody at issue that spans three consecutive melodic phrases in 12 bars and that includes exceedingly similar melodic phrase structures and melodic development. No such comparative melodic phrase structure or melodic development is present in “All On the Dawns” *as transcribed in the Finell Report*.

166. Paragraph 48 in the Finell Report attempts to obfuscate the paucity of its prior art. Therein, it claims to have “uncovered several pieces of prior art containing the entire scale degree sequence of phrase 1 of ‘Emmanuel’.” [Finell Report, ¶48, p. 37]. That is demonstrably false. Not a single prior art work in the Finell Report contains the entire identical scale degree sequence of “Emmanuel” as transcribed in the Finell Report.

167. Moreover, also in Paragraph 48, the Finell Report merely states that it “identified” prior art that “correspond to phrases 2 or 3”. In fact, not a single prior art work in the Finell Report embodies the very significant melodic similarities presented in the Ferrara Preliminary Report or as transcribed in the Finell Report. Notwithstanding unrelenting attempts at obfuscation, the findings in the Finell Report cannot hide from its own transcriptions of “Emmanuel” and “Christ” which are based on the published sheet music, nor can it hide from its transcriptions of its own prior art. Those transcriptions

objectively evidence the very significant similarities shared by “Emmanuel” and “Christ” and the paucity of similarities in the prior art as compared with the similarities shared by “Emmanuel” and “Christ”.

168. In Paragraph 49 on Page 37, the Finell Report correctly states that the Ferrara Preliminary Report found “no prior art containing the combination of melodic similarities, including the successive high notes in the three phrases of scale degrees 3, 4, and 6.” [Finell Report, ¶49, p. 37]. This finding is confirmed in this Rebuttal Report. In the same Paragraph, the Finell Report states that it has “found prior art with that exact succession of high notes.” This statement is presented without any analysis or examples. In fact, the Finell Report never analyzes the “high notes” in its presentation of prior art. Further, the boxed alleged phrases at issue in the presentation of prior art in the Finell Report are not consecutive and contiguous and, as shown above, many of those boxed phrases clearly omit the continuation of the melodic phrase.

169. Paragraph 50 on Page 38 of the Finell Report is largely redundant to its Paragraph 46. Paragraph 50 begins with the false and misleading statement “Lawrence Ferrara’s omission of prior art....” Contrarily, the Ferrara Preliminary Report noted that a preliminary prior art search was performed to ascertain “whether or not the *aggregate* of melodic similarities” between “Emmanuel” and “Christ” were in use prior to 1980, the copyright year of “Emmanuel”. Therein, it was noted that while some prior art works that embody part of the pitch sequence in melodic Phrase 1 were found:

“I did not find any compositions that embody the *aggregate* of melodic similarities in bars 1-12, including the melodic development of high notes respectively on scale degrees “3”, “4”, and “6” in each of the three 4-bar melodic phrases at issue.” [Ferrara Preliminary Report, ¶20, p. 7]

That is not an “omission of prior art”. Rather, it is a summary of findings of a preliminary search for prior art. If the false and misleading first sentence in Paragraph 50 on Page 38 of the Finell Report were self-applied, it would find that there is an “omission of prior art” because no prior art was found or presented that embodies the exceedingly significant similarities in melodic expression shared by “Emmanuel” and “Christ”.

170. Staying with Paragraph 50, the Finell Report states that the alleged “omission of prior art” in the Ferrara Preliminary Report “misleads by mischaracterizing the significance of shared features between ‘Emmanuel’ and ‘Christ,’ particularly because prior art reveals their commonplace usage.” [Finell Report, ¶50, p. 38] First, the Ferrara Preliminary Report accurately analyzed the many similarities shared by “Emmanuel” and “Christ”. None of those similarities presented in the Ferrara Preliminary Report have been shown to be wrong in the Finell Report.

171. Second and as to the Ferrara Preliminary Report’s allegedly “mischaracterizing the significance of shared features between ‘Emmanuel’ and ‘Christ’,” it is undeniable that melodic similarities that include 21 out of a total of 26 notes that share the same pitches, 13 of which share the same rhythmic durations, and additional melodic similarities such as the highest and lowest notes in melodic phrases and the exceedingly similar melodic development in three consecutive and contiguous melodic phrases would satisfy any musicological definition of very significant melodic similarities. Hence, there is no “mischaracterization” in the Ferrara Preliminary Report of the objective similarities in “Emmanuel” and “Christ”. Indeed, “the significance of shared features between ‘Emmanuel’ and ‘Christ’” is objectively and undeniably represented *as transcribed in the Finell Report*.

172. As shown above and established in the Ferrara Preliminary Report, there is no musicological evidence or support for the last sentence in Paragraph 50 of the Finell Report, namely: “My [the Finell Report’s] own prior art investigation has proven that the shared features have been part of the literature for 4 centuries.” [Finell Report, ¶50, p. 38] That statement is objectively refuted by the analyses and transcriptions of prior art in the Finell Report which fail to present any work that remotely embodies the very significant melodic similarities shared by “Emmanuel” and “Christ”, let alone the full 23 similarities they share.

DISSIMILARITIES ARE FAR OUTWEIGHTED BY SIGNIFICANT SIMILARITIES

173. In the section “Agreement on Dissimilarity” on Page 38, the Finell Report enumerates differences between “Emmanuel” and “Christ” that are agreed upon in the Finell Report and the Ferrara Preliminary Report. However, the presence of these few differences between “Emmanuel” and “Christ” does not negate nor outweigh the significant similarities between these works. As transcribed in the Finell Report and as analyzed above, there are 23 similarities between “Emmanuel” and “Christ”. The similarities shared between “Emmanuel” and “Christ” (1) are empirically verified *in the transcriptions in the Finell Report*, (2) very strongly support a claim of the copying of a significant amount of expression in “Christ” from “Emmanuel”, and (3) do not exist in any prior art work proffered in the Finell Report.

174. In Paragraph 51(d.), the Finell Report opines that the analysis of the “verse/refrain structure” [Finell Report, ¶51(d.), p. 38] in “Emmanuel” and “Christ” in the Ferrara Preliminary Report “has nothing to do with substantial similarity here.” [Finell Report, ¶51(d.), p. 38] First, “substantial similarity” is a legal term. If the Finell Report is presenting a legal conclusion, it should so specify its intention. Second, in keeping with widely accepted musicological practices, analysis of the overall structure or form of the works at issue is necessary and provides a context for the analysis of melody, harmony, and rhythm. In fact, the analysis of structure has been established in music copyright litigations.<sup>14</sup>

175. The Conclusions on Page 40 of the Finell Report briefly summarize Part 3 of the Finell Report, namely, the rebuttal of the Ferrara Preliminary Report. The content in each of the single-sentence Paragraphs, 52-55, has been refuted above. Therefore, no specific response is needed here. Overall, the Conclusions on Page 39 fail to refute

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<sup>14</sup> For example, Ronald S. Rosen writes: “Thus, from the copyright perspective (and in the view of many musical professionals)...the basic elements of music are: melody, harmony, rhythm, and form/structure.” (Ronald S. Rosen, *Music and Copyright*, Oxford University Press, 2008, p. 156) In addition and as cited in Rosen (footnote 19 on page 156): “In *Tisi v. Patrick*, both experts were in agreement “that the elements to be considered on the question of similarity between [the two songs] were structure, melody, harmony and rhythm.” 97 F.Supp.2d 539,543 (S.D.N.Y.2000).”

any of the objective musicological evidence and analysis in the Ferrara Preliminary Report. As presented in the Ferrara Preliminary Report and as transcribed in the Finell Report, “Emmanuel” and “Christ” share very significant melodic similarities that are not remotely found in the prior art presented in the Finell Report.

## **II. D. THE FINELL REPORT: “PART 4”, SUMMARY OF CONCLUSIONS**

### **THE CONCLUSIONS IN THE FINELL REPORT ARE CONTRADICTED BY ITS OWN TRANSCRIPTIONS**

176. The Summary of Conclusions on Page 41 of the Finell Report briefly summarizes findings throughout the Finell Report. The content in each of the brief Paragraphs, 56-58, has been refuted above. Therefore, no specific response is needed here. Overall, the significant similarities between “Emmanuel” and “Christ” are empirically verified in the Finell Report’s own transcriptions. Every attempt to obscure those similarities behind misleading, flawed and self-contradictory analyses failed.

177. Equally failing are the flawed and self-contradictory analyses of prior art. The prior art presented in the Finell Report does not remotely contain the very significant similarities in melodic expression, let alone the aggregate of 23 similarities that are shared between “Emmanuel” and “Christ”. The Finell Report’s cherry-picked melodies with numerous overlapping phrases, often with many intervening pitches, and significant rhythmic and metrical differences are far less similar to “Emmanuel” or “Christ” than “Emmanuel” and “Christ” are to one another. The misleading and scant presentation of prior art, which obscures the dissimilarities between the prior art and the works at issue, result in a deeply flawed analysis and the absence of any musicological support for the Finell Report’s far-fetched findings regarding prior art.

178. The rebuttal of the Ferrara Preliminary Report fails to refute the findings therein, and attempts to obscure the significant similarities between the works in issue. The misrepresentations presented in the Finell Report and its “Summary of Conclusions” on Page 40 in the Finell Report fall short and are refuted by its own transcriptions.

### **III. CONCLUSIONS**

179. The Finell Report has not changed my opinions as presented in the Ferrara Preliminary Report. It continues to be my opinion that there is strong musicological support for a claim that the musical composition in “Christ” copies a significant amount of expression in “Emmanuel” and that no prior art work has been found that embodies the aggregate of similarities at issue. Having assessed the Finell Report and the prior art proffered therein, it is my professional opinion that the similarities that are shared by “Emmanuel” and “Christ” strongly support a claim of the copying of a significant amount of expression, the aggregate of which does not exist in any prior art work proffered in the Finell Report. Notably, the most substantive similarity is found in respective 26-note melodies that span three consecutive melodic phrases in 12 bars in the Verses of “Emmanuel” and “Christ”. This very significant similarity in melodic expression that is shared in “Emmanuel” and “Christ” is absent in each and every prior art work proffered in the Finell Report. In addition, as shown above, none of the prior art works in the Finell Report remotely embodies the aggregate of 23 similarities shared by “Emmanuel” and “Christ”.

180. As explained above, the affirmative sections of the Finell Report (Parts 1 and 2) fail because they:

- Present a misleading, flawed, incomplete, and self-contradictory analysis of the melodies in “Emmanuel” and “Christ”;
- Do not provide any analysis of the harmonies (chords are merely listed in a Table) and present only one possible use of chords in “Emmanuel” and “Christ”;
- Are mistaken and self-contradictory in the analysis of structure;
- Present misleading, flawed, incomplete, and self-contradictory analyses of prior art;
- Present prior art that falls far short of the melodic similarities at issue and embodied in “Emmanuel” and “Christ”;
- Omit substantial portions of melodies in prior art; and

- Proffer analytical findings that are objectively refuted by the Finell Report's own transcriptions.

181. As explained above, the Rebuttal section of the Finell Report (Part 3) fails because it:

- Misleads, mischaracterizes, and misrepresents the analysis of "Emmanuel" and "Christ" in the Ferrara Preliminary Report;
- Misleads, mischaracterizes, and misrepresents the presentation of a preliminary prior art search in the Ferrara Preliminary Report;
- Contradicts its own focus on what it terms "crucial intervening pitches" in "Emmanuel" and "Christ" in its Part 3 rebuttal of the Ferrara Preliminary Report while completely omitting the analysis of "intervening pitches" in its entire Part 2 on prior art;
- Obscures and conflates "fundamental musical building blocks" with significant similarities in melodic expression shared by "Emmanuel" and "Christ"; and
- Proffers analytical findings regarding the Ferrara Preliminary Report that are objectively refuted by transcriptions and/or comparative charts in the Ferrara Preliminary Report and by its own transcriptions and comparative charts.

182. On that basis, I have found that in its transcriptions, the Finell Report provides empirical evidence that supports the analytical findings in the Ferrara Preliminary Report and in the rebuttal above. Moreover, I have found that given the paucity of the prior art transcribed and analyzed in the Finell Report, the findings in the Ferrara Preliminary Report regarding prior art are supported by the Finell Report. None

of the fifteen prior art works presented in the Finell Report even remotely embodies the very significant similarities shared by “Emmanuel” and “Christ”.

Respectfully submitted,

September 29, 2021

By: Lawrence Ferrara, Ph.D.

A handwritten signature in black ink, appearing to read "Lawrence Ferrara", is written over a horizontal line.

For: Lawrence Ferrara, Inc.

**APPENDIX 1**

**LAWRENCE FERRARA, Ph.D.**  
**PROFESSOR OF MUSIC**  
**DIRECTOR EMERITUS**  
**MUSIC AND PERFORMING ARTS PROFESSIONS**  
**THE STEINHARDT SCHOOL**  
**NEW YORK UNIVERSITY**

**Educational Background**

B.A.	Music	Montclair State University
M.M.	Music	Manhattan School of Music
Ph.D.	Music	New York University

**Teaching Background**

1979-84	Assistant Professor of Music	New York University
1984-92	Associate Professor of Music, Tenured	New York University
'92-present	(Full) Professor of Music	New York University
1995-2006	Professor of Music and Department Chair	New York University
2006-2011	Professor of Music and Director, Music & Perf Arts	New York University
2011 (Sept.)-present	Professor of Music and Director Emeritus	New York University

**Selected Professional Activities**

Netflix,

World-wide: 2021, Invited CLE lecture/presentation on music copyright for attorneys at Netflix, via Zoom

Cambridge,

Mass: 2021, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law, via Zoom

New York: 2021, participation on a panel regarding curricular development in musicology, American Musicological Society GNY, via Zoom

New York: 2020, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright, delivered via Zoom

Cambridge,

Mass: 2020, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2019, American Musicological Society GNY, peer-reviewed Keynote presentation regarding Music Copyright and Musicology, at New York University

Cambridge,

Mass: 2019, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2019, Download Digital Tech Conference hosted by Davis Wright Tremaine, invited participation on a panel regarding music copyright

New York: 2018, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Cambridge,

Mass: 2018, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2018, American Musicological Society GNY, invited participation on a panel hosted at Columbia University regarding Leadership and the Future of Musicology

New York: 2017, American Musicological Society GNY, peer-reviewed Keynote presentation regarding Philosophy and Musicology, at New York University (April)

New York: 2017, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Cambridge, Mass: 2017, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2017, American Musicological Society GNY, invited presentation and participation on a panel hosted at Columbia University regarding Leadership in Musicology (January)

Los Angeles, California 2017, Southwestern Law School Annual Media Law Conference, invited panel member regarding music copyright

New York: 2016, Loeb & Loeb, Annual IP/Entertainment Law CLE Conference, invited panel member regarding music copyright

New York: 2016, The Copyright Society of America (NY), invited panel member regarding music copyright

New York: 2016, American Musicological Society GNY, peer-reviewed presentation regarding Corpus Analysis in musicology

Cambridge, Mass: 2016, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2016, invited lecture on music copyright at Fordham University Law School, class on Advanced Copyright

Cambridge,

Mass: 2015, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2015, American Musicological Society GNY, invited presentation and participation on a panel hosted by The Juilliard School at Lincoln Center regarding Changes in Music Delivery and Reception in the 21<sup>st</sup> Century

Cambridge,

Mass: 2014, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2014, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

New York: 2014, American Musicological Society GNY, peer-reviewed presentation on musicological issues regarding the composition embodied in a sampled portion of a sound recording in music copyright claims

New York: 2014, International Double Reed Society Conference, invited presentation on the musicological elements and implications in *Newton v. Diamond*

Cambridge,

Mass: 2013, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2013, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

New York: 2013, American Musicological Society GNY, peer-reviewed presentation including an analysis of the musical composition in “The Phantom Song” from *Phantom of the Opera* by Andrew Lloyd Webber related to *Repp v Webber*

New York: 2012, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Cambridge,

Mass: 2012, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

Sweden: 2011, interviewed (in New York) and featured in the Swedish TV series, "The Story Behind the Hit Song," regarding music copyright

Cambridge,  
Mass: 2011, invited lecture on music copyright at Harvard University Law School, class on Music and Media Law

New York: 2010, invited presentation and moderator of a panel on sound recording sampling and music copyright for The Copyright Society of the United States, New York Chapter

New York: 2010, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Montclair,  
NJ: 2010, invited to give the Inaugural Jack Sacher Memorial Research Lecture (on music analysis in music copyright matters) for the opening of the John Cali School of Music at Montclair State University

New York: 2010, invited lecture on music copyright followed by a dialogue with Academy Award winner, F. Murray Abraham, for The Pathfinders Series at The First Presbyterian Church of New York City

New York: 2008, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright

Ireland: 2007, interviewed on Irish radio regarding music copyright

New York: 2007, Invited opening and closing lectures for a Conference co-sponsored by The New York Philharmonic and the Finnish Consulate on Music regarding Music Learning and Performance in Finland

New York: 2006, invited panelist at the CMJ Conference at Lincoln Center regarding music copyright

New York: 2006, invited panelist at the Remix Conference regarding music copyright

New York: 2006, invited presentation for the New York Institute for the Humanities regarding music analysis and music copyright

- New York: 2006, invited Keynote Address for The Mastery of Music Teaching Conference sponsored by The Metropolitan Opera Guild and The New York Philharmonic
- Washington  
D.C.: 2005, invited panelist/presenter at the Future of Music Policy Summit regarding music copyright and *Newton v Diamond*
- New York: 2005, invited panel and group discussion leader at the United Nations regarding rhythm in the music of multiple cultures as part of the U.N.'s World Summit on the "Information Society" and the United Nations Information and Communications Technology Task Force
- Cambridge,  
Mass.: 2005, invited panelist/presenter at Harvard University Law School's Berkman Center in a national conference regarding technology and intellectual property
- New York: 2005, invited music copyright presentation at Columbia University Law School, class on Federal Courts Litigation: Trademark and Copyright
- Los  
Angeles: 2005, invited lecture regarding music analysis and music copyright in Los Angeles for an NYU Alumni event
- Orlando: 2005, invited lecture regarding music copyright and music analysis in Orlando, Florida for an NYU Alumni event
- Hawaii: 2004, invited workshop presentation and session chair regarding methodology for the analysis of a J. S. Bach organ prelude for the International Conference on Arts and the Humanities
- Norway: 2003, invited series of lectures on music theory and analysis co-sponsored by the Music Theory and Composition Departments of the Norwegian Music Academy, and the Department of Philosophy at the University of Oslo
- New York: 2001, invited presentation and Chair of a panel at The United Nations regarding "Music within a Global Context."

Italy: Summer 1993 & Summer 1994, Visiting Professor at University of Pisa teaching music analysis, performance practices, and philosophy of music

As a pianist, performed solo recitals and as an accompanist in the United States and Europe including on radio and television, recordings released by Orion Master Recordings and Musique international, and performed for musical theatre shows, accompanist to internationally acclaimed singers, and as a session pianist in pop styles.

At New York University's Steinhardt School: Director of Music Performance Programs from 1980-1985, Director of Ph.D. Programs from 1986-1995, Chair of the Department from 1995 – 2011, and Director of all Music and Performing Arts studies (undergraduate through Ph.D.) in The Steinhardt School at New York University from 2006-2011. Named "Director Emeritus" of Steinhardt Music and Performing Arts in 2011. Currently on the full-time faculty in music theory and music history.

Currently a member of the Editorial Board of the journal *Music and Moving Image* (University of Illinois Press) and on the board of Editorial Consultants for the journal *Philosophy of Music Education Review* (Indiana University Press).

### **Awards**

1972	Stoekel Fellowship, Yale University Graduate School of Music, Chamber Music
1985	Presidential Research Fellowship, NYU
1988	Co-PI, Federal Grant for Research
1989	Co-PI, Federal Grant for Research renewed
1996	Daniel E. Griffiths Award for publication regarding the analysis of Arthur Schopenhauer's works on music (Cambridge University Press, 1996).

### **Membership in Professional Organizations**

American Musicological Society

Society for Music Theory

### **Publications: Books**

Ferrara, Lawrence                      *Philosophy and the Analysis of Music: Bridges to Musical Sound, Form and Reference* (Greenwood Press) 1991

Ferrara, Lawrence and  
Kathryn E. Ferrara                      *Keyboard Harmony and Improvisation* (Excelsior Music Publishers) 1986

Phelps, Roger, Lawrence  
Ferrara and Thomas  
Goolsby                                      *A Guide to Research in Music Education*, Fourth Edition.  
(Scarecrow Press/The Rowman & Littlefield Publishing Group) 1993

Phelps, Roger, Lawrence  
Ferrara, *et al*                                      *A Guide to Research in Music Education*, Fifth Edition  
(Scarecrow Press/The Rowman & Littlefield Publishing Group) 2005

### **Courses Taught at NYU**

Aesthetic Foundations of the Arts:                      for Ph.D. students

Aesthetic Inquiry:    for Ph.D. students

Arts Heritage and Criticism:                                      for M.M. students

Classic Era Music, Analysis:                                      for M.M. students

Contemporary Music, Analysis:                                      for M.M. and Ph.D. students

Dissertation Proposal Seminar:                                      for Ph.D. students

Keyboard Harmony and Improvisation:                                      for B.M. students

Music Copyright, Landmark Cases:                                      for B.M. students

Music Criticism: for M.M. students

Music History III, 19<sup>th</sup> Century: for B.M. students

Music History IV, 20<sup>th</sup> & 21<sup>st</sup> Century: for B.M. students

Music Performance Practices: for M.M. students

Music Reference & Research Methods: for M.M. and Ph.D. students

Music Theory and Analysis: for B.M. students

Seminar in Music Theory & Analysis: for M.M. and Ph.D. students

### **Music Copyright**

A music expert in music copyright issues for more than twenty years providing opinions for plaintiffs and defendants

An active music copyright consultant for record, music publishing, and motion picture companies, and for individuals in the United States and abroad

A regularly invited guest lecturer in music copyright in classes at Columbia University Law School and Harvard University Law School

A conference panelist sponsored by Harvard Law School in 2005, a panel moderator in 2010 and a panel member in 2016 for The Copyright Society of the United States (NY), and a panelist for conferences regarding music copyright at Loeb and Loeb (NY) in 2016, Southwestern Law School (LA) in January 2017, and Davis Wright Tremaine (NY) in 2019.

Peer-reviewed presentations regarding music copyright for the American Musicological Society (GNY) in 2013, 2014, 2016, and 2019.

**Deposition and/or Trial Testimony in the last ten years**

- (1) Batts et al. v. Adams et al. in 2011
- (2) Francescatti v. Germanotta et al. in 2013
- (3) Marino v. Usher et al. in 2013
- (4) Roberts et al. v. Gordy et al. in 2014
- (5) Roberts et al. v. Gordy et al. in 2015
- (6) Fahmy v. Shawn Carter et al. in 2015
- (7) Copeland v. Bieber et al. in 2016
- (8) Skidmore v. Led Zeppelin et al. in 2016
- (9) Gray, et al. v. Perry, et al. in 2018
- (10) Gray, et al. v. Perry, et al. in 2019
- (11) Hall et al. v. Swift, et al. in 2021

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# **REBUTTAL REPORT VISUAL EXHIBIT A**

**DRAFT: PRIVILEGED AND CONFIDENTIAL WORK PRODUCT**

**LAWRENCE FERRARA, Ph.D.  
FOR: LAWRENCE FERRARA, INC.**

**PRELIMINARY REPORT REGARDING**

**The Musical Compositions in**

**“Emmanuel” written by Vince Ambrosetti**

**And**

**“Christ, Be Our Light” written by Bernadette Farrell**

**I. INTRODUCTION**

1. My rank at New York University is Professor of Music, and my title is Director Emeritus of all studies (B.M. through Ph.D.) in Music and the Performing Arts in New York University’s Steinhardt School. I have written and co-written published books and articles (in peer-reviewed journals) regarding music analysis, methodologies in music research, and other scholarly areas related to music. I currently sit on editorial boards of peer-reviewed journals. I have provided analyses and opinions in connection with music copyright issues for more than 20 years. My *curriculum vitae* is available upon request.

2. I have been asked to complete a comparative musicological analysis of the musical compositions in “Emmanuel” written by Vince Ambrosetti (© 1980) and “Christ, Be Our Light” written by Bernadette Farrell (© 1993 and hereafter “Christ”). The purposes of my analysis are to ascertain (1) whether or not there is objective musicological evidence of copied expression in “Christ” from “Emmanuel”, (2) whether or not the aggregate of similarities between “Christ” and “Emmanuel” are significant, and/or (3) whether or not the aggregate of similarities between these two compositions was in use prior to 1980, the copyright year of “Emmanuel”.

3. A copy of the “Emmanuel” published sheet music is attached as Visual Exhibit A. A copy of the “Christ” published sheet music is attached as Visual Exhibit B.

4. Herein, I summarize the key points of my findings. This preliminary report does not represent a full report of my complete findings.

## **II. FINDINGS**

5. The overall structure of “Emmanuel” and “Christ” is a Verse/Refrain form. The Verse in both compositions is sixteen bars<sup>1</sup> in length. The melodies at issue are (1) in the Verses in “Emmanuel” and “Christ”, and (2) in the Refrain in “Emmanuel”. In “Emmanuel”, the melody in bars 9 – 16 of the Verse is varied and is the basis of the Refrain in “Emmanuel”. Therefore, the music in the Refrain of “Emmanuel” is also at issue. On the other hand, the melody in the Refrain of “Christ” is distinct from melody in the Verse of “Christ”. Therefore, the music in the Refrain of “Christ” is not at issue.

6. As demonstrated in Visual Exhibits A and B referenced above and attached to this report, the Verses in “Emmanuel” and “Christ” are in the key of E minor.<sup>2</sup> In addition, “Emmanuel” and “Christ” are both in 3/4 meter, i.e., each bar (or “measure”) consists of three quarter note beats.

7. The melodic phrase structure in the Verses in “Emmanuel” and “Christ” is the same, namely, melodic phrases consisting of four-bars each. The main similarities are in bars 1-12 in the Verses of both compositions.

### The melodies in bars 1-4 in the Verses

8. Based on the melodies in the published sheet music of both works, Musical Example 1 immediately below is a comparative transcription of the melodies in bars 1-4 in the Verses, wherein the melody in bars 1-4 in “Emmanuel” is placed over the

---

<sup>1</sup> A “bar” (also termed a “measure”) is a unit of musical time.

<sup>2</sup> While the Refrain in “Emmanuel” maintains the Verse key of E minor, the Refrain in “Christ” changes to G major.

melody in bars 1-4 in “Christ”. Dotted lines connect identical pitches within the overall sequence (or order) of pitches in both melodies.

### MUSICAL EXAMPLE 1

#### “Emmanuel” / “Christ, Be Our Light”

Bars 1-4 in the Verses



8. Pitches in a melody can be identified by their scale degrees.<sup>3</sup> The scale degrees in the pitch sequences in bars 1-4 in the Verses of “Emmanuel” and “Christ” are charted immediately below. In order to facilitate the reading of the chart below, identical pitches are in **bold** and the final pitch (scale degree 5) is in *italics*.

“Emmanuel”:        **5** **1** **2** **3** **2** **1** **7** **1** *2* *5*  
 “Christ”:         **5** **1** **2** **3** **2** **1** **7** **1** *5*

9. As transcribed and charted above, the first 8 (out of a total of 9) pitches in “Christ” are identical to the first 8 pitches in “Emmanuel”. Scale degree “5” is the lowest pitch in both melodies, and starts and ends both melodies. Scale degree “5” leaps up to scale degree 1 at the start of both melodies. Moreover, the highest pitch in both melodies is on scale degree “3”. Thus in addition to eight identical pitches, both

<sup>3</sup> As noted above, the Verses in “Emmanuel” and “Christ” are in the key of E minor. There are seven scale degrees in an E natural minor scale: the pitch “e” is scale degree 1, the pitch f-sharp is scale degree 2, the pitch “g” is scale degree 3, the pitch “a” is scale degree 4, the pitch “b” is scale degree 5, the pitch “c” is scale degree 6, and the pitch “d” is scale degree 7.

melodies start and end on the same lowest pitch (scale degree “5”), and reach their highest pitch in exactly the same sequence to scale degree “3”.

10. As illustrated in Musical Example 1 above, the melody in “Emmanuel” begins one beat earlier than the melody in “Christ”. Thus, the metrical placement (*i.e.*, the placement on beats within a bar) is not the same. On the other hand, the rhythmic durations of 7 out of the total of 9 pitches are identical to the rhythmic durations of corresponding identical pitches connected by dotted lines in Musical Example 1 above.

#### The melodies in bars 5-8 in the Verses

11. Now turning to the melodies in bars 5-8 in the Verses in “Emmanuel” and “Christ”, based on the melodies in the published sheet music of both works, Musical Example 2 immediately below consists of the Verse melody in bars 5-8 in “Emmanuel” placed over the Verse melody in bars 5-8 in “Christ”. Dotted lines connect identical pitches within the overall sequence of pitches in both melodies.

### MUSICAL EXAMPLE 2

#### “Emmanuel” / “Christ, Be Our Light”

##### Bars 5-8 in the Verses

The image displays two musical staves in 3/4 time, both in the key of D major (indicated by two sharps). The top staff is labeled '"Emmanuel" bars 5-8' and the bottom staff is labeled '"Christ Our Light" bars 5-8'. The melody for 'Emmanuel' begins on a half note D4 in bar 5, followed by quarter notes E4, F#4, G4, A4, B4, and a half note C5 in bar 6, ending with a whole note B4 in bar 7. The melody for 'Christ Our Light' begins on a quarter note D4 in bar 5, followed by quarter notes E4, F#4, G4, A4, B4, and a quarter note C5 in bar 6, ending with a half note B4 in bar 7. Dashed lines connect the identical pitches between the two staves: D4 (bar 5), E4 (bar 5), F#4 (bar 5), G4 (bar 5), A4 (bar 5), B4 (bar 5), C5 (bar 6), and B4 (bar 7).

12. The scale degrees in the pitch sequences in the melodies in bars 5-8 in the Verses of “Emmanuel” and “Christ” are charted immediately below. Identical corresponding pitches are highlighted in **bold** to facilitate the reading of the chart.

“Emmanuel”:       **5 1 2 3 4 3 2 1**  
 “Christ”:           **5 1 2 3 4 2 7 1**

13. As charted immediately above, 6 out of a total of 8 pitches in “Emmanuel” and “Christ” are identical in pitch sequence. Scale degree “5” is the lowest pitch in both melodies, and both melodies end on scale degree “1”. Scale degree “5” leaps up to scale degree 1 at the start of both melodies. Moreover, the highest pitch in both melodies is on scale degree “4”. Thus, in addition to 6 identical pitches, both melodies (1) start on scale degree “5” which leaps to scale degree 1, (2) end on scale degree “1”, and (3) reach their highest pitch in exactly the same pitch sequence to scale degree “4”.

14. As illustrated in Musical Example 2 above, the melody in “Emmanuel” begins one beat earlier than the melody in “Christ”. Thus, the metrical placement is not the same. On the other hand, the rhythmic durations in 5 out of the total of 8 pitches is identical to the rhythmic durations in corresponding identical pitches as connected by dotted lines in Musical Example 1 above. In addition, the rhythmic duration of the final pitch is long in both: a dotted half note held over to a half note in “Emmanuel” and a dotted half note in “Christ”.

#### The melodies in bars 9-12 in the Verses

15. Now turning to the melodies in bars 9-12 in the Verses, based on the melodies in the published sheet music of both works, Musical Example 3 below is a comparative transcription of the melodies in bars 9-12 in the Verses, wherein the melody in bars 9-12 in “Emmanuel” is placed over the melody in bars 9-12 in “Christ”. Dotted lines connect identical pitches within the overall sequence of pitches in both melodies.

**MUSICAL EXAMPLE 3****“Emmanuel” / “Christ, Be Our Light”**

Bars 9-12 in the Verses



16. The scale degrees in the pitch sequences in bars 9-12 in the Verses of “Emmanuel” and “Christ” are charted immediately below.

“Emmanuel”:	6	5	4	3	4	5	3	5
“Christ”:	3	4	5	6	4	3	4	5

17. As charted immediately above, only 2 pitches appear to line up. However, as illustrated with dotted connecting lines in Musical Example 3, the last 5 pitches in “Christ” are identical in pitch sequence with corresponding pitches in “Emmanuel”. Moreover, the highest pitch in both melodies is on scale degree “6”. Thus, in terms of highest pitches, the development of the melody in the Verses in bars 1-12 in “Emmanuel” and “Christ” is the same: the highest pitch in the first 4-bar melodic phrase (bars 1-4) is on scale degree “3”, the highest pitch in the second 4-bar melodic phrase (bars 5-8) is on scale degree “4”, and the highest pitch in the third 4-bar melodic phrase (bars 9-12) is on scale degree “6”. In addition, as analyzed above, the lowest pitches in the first two 4-bar melodic phrases is the same, and the first and last pitches in the first two 4-bar melodic phrases are the same.

18. As illustrated in Musical Example 3 above, while the melody in “Christ” has three opening pitches that do not correspond to pitches in the opening of “Emmanuel”, starting on the high pitch in both 4-bar melodies (on scale degree “6”), the pitch sequences of the melodies line up almost identically. In addition, the metrical placement of five of the last six pitches in “Christ” is the same as in corresponding pitches connected by dotted lines in “Emmanuel”. The rhythmic durations in 3 out of the last 5 pitches in “Christ” are identical to the rhythmic durations in corresponding identical pitches connected by dotted lines.

19. In summary, the *aggregate* of melodic similarities in bars 1-12 in the Verses in “Emmanuel” and “Christ” constitutes a significant amount of musical expression, and provides strong objective musicological evidence of copying.

## **PRIOR ART**

20. In order to provide an opinion as to whether or not the *aggregate* of melodic similarities analyzed above between “Emmanuel” and “Christ” were in use prior to 1980 (the copyright year of “Emmanuel”), I completed a preliminary prior art search.<sup>4</sup> On the basis of my preliminary prior art search, I did not find any musical work that embodies the *aggregate* of melodic similarities objectively found in “Emmanuel” and “Christ”. While I found compositions that embody the 5, 1, 2, 3, 2, 1, 7, 1 pitch sequence, i.e., the first 6 pitches in bars 1-4 in “Emmanuel” and “Christ”, I did not find any compositions that embody the *aggregate* of melodic similarities in bars 1-12, including the melodic development of high notes respectively on scale degrees “3”, “4”, and “6” in each of the three 4-bar melodic phrases at issue.

## **II. CONCLUSIONS**

21. On the basis of my analysis, I found that the *aggregate* of melodic similarities between “Emmanuel” and “Christ” constitutes a significant amount of expression, and provides strong objective musicological evidence of copying.

---

<sup>4</sup> “Prior art” in this report are musical compositions that predate 1980.

22. On the basis of a search for prior art, I did not find any prior art work that embodies the *aggregate* of melodic similarities shared by “Emmanuel” and “Christ”.

23. Therefore, it is my professional opinion that there is strong musicological support for a claim that the musical composition in “Christ” copies “protectable” expression in “Emmanuel”.

Respectfully submitted,

# **VISUAL EXHIBIT A**

ADVENT

000

## Emmanuel



1. A vir - gin shall bring forth a first - born
2. Un - to you this day shall be born a
3. A child who was born of such low - ly
4. All na - tions stand read - y to greet His



son, con - ceived by the Spir - it of God.  
 king, the light for a world full of dark.  
 state, wrapped on - ly in swad - dling clothes.  
 face, a vig - il we keep for His birth.



He shall save all His peo - ple, and  
 He shall be our sal - va - tion, and  
 Kings shall pause to be - hold His sight, all  
 He shall be filled with wis - dom, and



die, our ran - som for sin.  
 so His name shall be Je - sus.  
 knees shall bend at His name.  
 reign His peo - ple with love.

Refrain



Em - man - u - el, Em - man - u - el,



come and live in our midst; Em - man - u - el, Em -



man - u - el, come make Your home in our hearts.

Text: Matthew 1:18-25, Isaiah 9:1-6, Luke 2:1-20; Vince Ambrosetti, b.1956  
 Music: Vince Ambrosetti, b.1956  
 © 1980, International Liturgy Publications

# **VISUAL EXHIBIT B**

LIGHT

000

## Christ Be Our Light

Verses



1. Long - ing for light, we wait in dark - ness.  
 2. Long - ing for peace, our world is trou - bled.  
 3. Long - ing for food, man - y are hun - gry.  
 4. Long - ing for shel - ter, man - y are home - less.  
 5. Man - y the gifts, man - y the peo - ple,  
 \*1. This is the night of new be - gin - nings.  
 \*2. This is the night Christ our Re - deem - er  
 \*3. Now will the fire kin - dled in dark - ness  
 \*4. Sing of the hope deep - er than dy - ing.  
 \*5. In - to this world morn - ing is break - ing.



Long - ing for truth, we turn to You.  
 Long - ing for hope, man - y de - spair.  
 Long - ing for wa - ter, man - y still thirst.  
 Long - ing for warmth, man - y are cold.  
 man - y the hearts that yearn to be - long.  
 This is the night when heav - en meets earth.  
 rose from the grave tri - um - phant and free,  
 burn to dis - pel the shad - ows of night.  
 Sing of the power strong - er than death.  
 All of God's peo - ple, lift up your voice.



Make us Your own, Your ho - ly peo - ple,  
 Your word a - lone has power to save us.  
 Make us Your bread, bro - ken for oth - ers,  
 Make us Your build - ing, shel - ter - ing oth - ers,  
 Let us be ser - vants to one an - oth - er,  
 This is the night filled with God's glo - ry,  
 leav - ing the tomb of e - vil and dark - ness,  
 Star of the Morn - ing, Je - sus our Sav - ior,  
 Sing of the love end - less as heav - en,  
 Cry out with joy, tell out the sto - ry,

\*Easter Vigil verses

## LIGHT



light for the world to see.  
 Make us Your liv - ing voice.  
 shared un - til all are fed.  
 walls made of liv - ing stone.  
 mak - ing Your king - dom come.  
 prom - ise of our new birth!  
 emp - ty for all to see.  
 You are the world's true light!  
 dawn - ing through - out the earth.  
 all of the earth re - joice.

## Refrain



Christ, be our light! Shine in our hearts.



Shine through the dark - ness. Christ, be our light!



Shine in Your Church gath-ered to - day.

Text: Bernadette Farrell, b.1957  
 Music: Bernadette Farrell, b.1957  
 © 1993, 2000, Bernadette Farrell. Published by OCP Publications

# REBUTTAL REPORT

## VISUAL EXHIBIT B

(11 PDFs)

## Theme Information

Anonymous, All on the dawns



<i>Manuscript Location</i>	Austin, Texas, The University of Texas, The Harry Ransom Humanities Research Center
000 (Control no.)	1000112751
002 (Composer)	Anonymous
012 (Uniform title)	All on the dawns
014 (Instrumentation)	V (1), keyb
018	All on the dawns
026 (Key or mode)	g
032 (Title trans.)	[caption title, p. 56:] N.o 36.
052 (Copy of autograph)	Ms
054 (MS date)	1791
062 (Collation)	score: p56
082 (Size of MS)	29.5 x 24
086 (MS type)	a
092 (Section descriptions)	All on the Dawns, [without denotation], g, [3/4]
100	eng
102 (Text incipit)	All on the dawns (1.1.1)
112A	1.1.1
112B	V.
112C	G-2
112D	bBE
112E	[3/4]
112F	'4DGA/BAG/xFGA/2.D/4GFE/DCD/
122 (Solo vocal parts)	001X
162 (Bass)	keyb: keyb
192 (Original genre names)	Song
194 (Genre codes)	sg
212 (Provenance: personal names)	Clive, Charlotte
212 (Provenance: personal names)	Finney, Theodore M.
222 (RISM A/II x-ref)	1000112710
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A158  
S.A.T.B.

## At the Name of Jesus

To the tune 'King's Weston'

Caroline M. Noel

R. VAUGHAN WILLIAMS

Arranged with varied settings  
for a festival service by the composer

**With vigour** **f**

VOICES  
in unison

1. At the Name of Je - sus  
2. At his voice cre - a - tion

ORGAN

Eve - ry knee shall bow, Eve - ry tongue con - fess him King of glo - ry  
Sprang at once to sight, All the An - gel fa - ces, All the hosts of

now; 'Tis the Fa - ther's plea - sure We should call him Lord,  
light, Thrones and dom - in - a - tions, Stars up - on their way,

1 *D.S.* 2

Who from the be - gin - ning Was the migh - ty Word.  
All the heavenly or - ders, In their great ar - ray.

*dim.*

**CHOIR ONLY**  
Sop. & Alto

*p*

3. Hum - bled for a sea - son, To re - ceive a name \_\_\_\_\_

Ten. & Bass

*p*

Gt. 8 & 4 ft. 4 ft. to predominate

*mf*

*p*

From the lips of sin - ners Un - to whom he came, \_\_\_\_\_

Faith-ful - ly he bore it Spot-less to the last,

*cresc.*

Brought it back vic - to - rious When from death he passed:

*f*

DESCANT (Boys' or women's voices)

4. Bore it up tri - um - phant With its hu - man

CHOIR and PEOPLE in unison

4. Bore it up tri - um - phant With its hu - man light, Through all ranks of

*f*

light, Through all ranks of crea - tures, To the  
crea - tures, To the cen - tral height, To the throne of God - head,

This system contains the first three staves of the musical score. The top staff is a vocal line in G major (one sharp) with lyrics. The middle staff is a vocal line in G major with lyrics. The bottom staff is a piano accompaniment in G major, consisting of a treble and bass clef with chords and moving lines.

cen - - - tral height, Filled it with the  
To the Fa - ther's breast; Filled it with the glo - ry Of that

This system contains the next three staves of the musical score. The top staff is a vocal line in G major with lyrics. The middle staff is a vocal line in G major with lyrics. The bottom staff is a piano accompaniment in G major, consisting of a treble and bass clef with chords and moving lines.

glo - - - ry Of that per - fect rest.  
per - fect rest.

This system contains the final three staves of the musical score. The top staff is a vocal line in G major with lyrics. The middle staff is a vocal line in G major with lyrics. The bottom staff is a piano accompaniment in G major, consisting of a treble and bass clef with chords and moving lines.

## CHOIR ONLY (unaccompanied)

Sop. &amp; Alto

*pp*

5. Name him, bro-thers, name him, With love as strong as death, — But with awe and

Ten. & Bass  
*pp*

*cresc.*

won - der, And with ba - ted breath; — He is God the Sa - viour,

*cresc.*

*dim.*

He is Christ the Lord, — Ev - er to be wor-shipped, Trust-ed, and a -

*dim.*

*p*

DESCANT *mf*

6. In your hearts en - throne him;

- dored. —

*p*

CHOIR and PEOPLE *mf*

6. In your hearts en - throne him; There let him sub -

*p*

*mf*

There let him sub - due All that is not  
- due All that is not ho - ly, All that is not true;

This system contains the first three staves of the musical score. The top staff is the vocal melody in G major, starting with a treble clef and a key signature of one sharp (F#). The lyrics are written below the notes. The middle staff is a single treble clef staff, likely for a second voice or a specific instrument. The bottom staff is a grand staff (treble and bass clefs) for piano accompaniment. The piano part features a steady bass line and chords that support the vocal melody.

ho - - - ly, All that is not true: Let his  
Crown him as your cap - tain In temp - ta - tion's hour; Let his will en -

This system contains the next three staves. The vocal melody continues with a long note on 'ho' followed by a crescendo leading into 'ly'. The piano accompaniment provides harmonic support with chords and moving lines in both hands. The lyrics are aligned with the notes.

will en - fold you In its light and power.  
- fold you In its light and power.

This system contains the final three staves. The vocal melody concludes with a long note on 'will' followed by a crescendo. The piano accompaniment continues with sustained chords and moving lines. The lyrics are aligned with the notes.

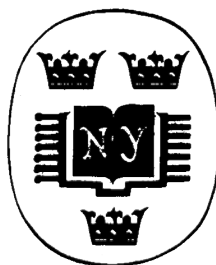
ALL VOICES in unison

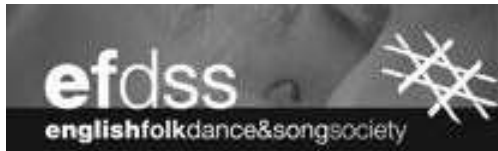
7. Bro - thers, this Lord Je - sus Shall re - turn a - gain,

With his Fa - ther's glo - ry, With his An - gel train;

For all wreaths of em - pire Meet up - on his brow,

And our hearts con - fess him King of glo - ry now.





---

The Life and Times of Black-Ey'd Susan: The Story of an English Ballad

Author(s): ANDREW GUSTAR

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# The Life and Times of Black-Ey'd Susan: The Story of an English Ballad

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## Abstract

John Gay's nautical ballad 'Sweet William's Farewell to Black-Ey'd Susan', published in 1719, was soon set to music by composers including Richard Leveridge, whose setting became the established version. The song remained popular, and inspired art, literature, and numerous musical arrangements and interpretations, with a modified version of the original tune becoming standard from the mid-nineteenth century. Appropriated as a traditional song on both sides of the Atlantic, it was encountered, in different versions, by folk song collectors, including Cecil Sharp. It continues to appear in song collections and as part of the performed repertoire.

Several years ago I purchased a copy of the *Daily Express Community Song Book* from 1927, containing songs ranging from the well-known 'Clementine' and 'On Ilkley Moor Baht 'At' to the less familiar 'Can Ye Sew Cushions?' and 'O Willie Brewed a Peck o' Maut'.<sup>1</sup> On page 27 is the charming nautical ballad 'Black-Eyed Susan', credited to John Gay and Richard Leveridge, 1725? – which led me to wonder what had happened to it during the intervening two hundred years, and what has become of it since.

In this article, I examine the origins of 'Black-Eyed Susan' and follow its journey into the *Community Song Book* and beyond. The first two sections investigate the origins of John Gay's poem, and of several competing candidates for the tune. In the third section, I trace the song's eventful voyage through almost three centuries, including its transformation into a folk song. The concluding section discusses the reasons for the song's extraordinary longevity.

## The Words

The *Post-Man and the Historical Account* of Saturday, 10 January 1719, informed Londoners that 'This day is publish'd, Sweet William's Farewel to Black Ey'd Susan. A Ballad. Printed for Bernard Lintot between the Temple Gates.' Although the author is not credited, this appears to be the first reference to John Gay's poem.

John Gay was already an established poet and a successful playwright. His satirical

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*Sweet William's Farewell to Black-Ey'd Susan. A Ballad (1719)*

All in the Downs the fleet was moor'd,  
 The streamers waving in the wind,  
 When black-ey'd Susan came aboard.  
 Oh! where shall I my true love find!  
 Tell me, ye jovial sailors, tell me true,  
 If my sweet William sails among the crew.

William, who high upon the yard,  
 Rock'd with the billow to and fro,  
 Soon as her well-known voice he heard,  
 He sigh'd, and cast his eyes below:  
 The cord slides swiftly through his glowing  
 hands,  
 And, (quick as lightning,) on the deck he  
 stands.

So the sweet lark, high pois'd in air,  
 Shuts close his pinions to his breast,  
 (If, chance, his mate's shrill call he hear)  
 And drops at once into her nest.  
 The noblest Captain in the British fleet,  
 Might envy William's lip those kisses sweet.

O Susan, Susan, lovely dear,  
 My vows shall ever true remain;  
 Let me kiss off that falling tear,  
 We only part to meet again.  
 Change, as ye list, ye winds; my heart shall  
 be.

The faithful compass that still points to thee.

Believe not what the landmen say,  
 Who tempt with doubts thy constant mind:  
 They'll tell thee, sailors, when away,  
 In ev'ry port a mistress find.  
 Yes, yes, believe them when they tell thee so,  
 For thou art present wheresoe'er I go.

If to far India's coast we sail,  
 Thy eyes are seen in di'monds bright,  
 Thy breath is Africk's spicy gale,  
 Thy skin is ivory, so white.  
 Thus ev'ry beauteous object that I view,  
 Wakes in my soul some charm of lovely Sue.

Though battel call me from thy arms,  
 Let not my pretty Susan mourn;  
 Though cannons roar, yet safe from harms,  
 William shall to his Dear return.  
 Love turns aside the balls that round me fly,  
 Lest precious tears should drop from Susan's  
 eye.

The boatswain gave the dreadful word,  
 The sails their swelling bosom spread,  
 No longer must she stay aboard:  
 They kiss'd, she sigh'd, he hung his head.  
 Her less'ning boat, unwilling rows to land:  
 Adieu, she cries! and wav'd her lilly hand.

approach often attracted controversy and he seems to have been perpetually short of money. The list of 364 subscribers to his lavish edition of *Poems on Several Occasions* (1720), which included Alexander Pope, George Frideric Handel, and the Prince and Princess of Wales, is evidence both of his popularity in certain circles and of his need for cash.<sup>2</sup> Gay went on to invest most of the money raised by *Poems on Several Occasions* in stock of the South Sea Company. Within a few months, the South Sea Bubble burst and he lost most of his investment.

The sailor's farewell theme of 'Sweet William's Farewell to Black-Ey'd Susan' resonated at a time when seamen were playing a vital role in expanding and defending the British Empire, and facilitating Britain's international trade and communications. London was the wealthiest and most vibrant city in the world, with a sophisticated and active literary and musical life. The poem appears quickly to have become one of Gay's best-known works. In 1726, Alexander Pope wrote 'An Epistle from Mr Pope to Mr Gay, Occasioned by Two Stanzas in his Ballad of Black-Ey'd Susan', in which he praises Gay's 'loftiest Poetry' and exclaims:

How does th' applauding World with Wonder view  
 A Nymph, or Heroine, in a *Black-Ey'd Sue!*  
 Whose Charms thy Verse has spread from Pole to Pole,  
 Where Winds can carry, or where Waves can roll.<sup>3</sup>

Dianne Dugaw describes 'Sweet William's Farewell' as 'surely Gay's most popular ballad', and comments that, while it observes the 'street-ballad milieu', the poem's 'literary artfulness' differentiates it from the traditional street ballad pattern, and that Gay's 'complex, nuanced and participatory' relationship to balladry, of which this is an example, was important in paving the way for his invention of the ballad opera in 1728.<sup>4</sup>

Andrew Kuntz, who has collected and researched a large number of British, Irish, and North American traditional tunes, suggests that the poem was inspired by the courtship of William Whitcraft and Susan Cole.<sup>5</sup> Their tale appeared several times on broadsides and in chapbooks from c.1735, as *Sweet William of Phymouth* or *The Western Garland*.<sup>6</sup> These publications recount the story of a sailor, William, and his betrothed, Susan, who was disowned by her family when she refused to marry her mother's preferred suitor while William was at sea; Susan then ran away and was reunited with William in Holland, whence the pair returned, after they had married, to Plymouth.<sup>7</sup> It seems unlikely, however, that this tale did inspire Gay's poem. Not only do the stories differ, and there is no mention in these accounts of 'black-ey'd' Susan's distinctive epithet, but the dates are also too far apart for comfort. Gay's poem, moreover, was appearing at the same time, in chapbooks titled *William and Susan's Garland* or *Black Ey'd Susan's Garland*.<sup>8</sup> In some of these, Gay's original poem provides the first item, with extra (anonymous) pieces, in a similar style, extending the story to deal with Susan's longing, William's return, and their eventual marriage. Although there are some similarities with the narrative in *The Western Garland*, it is not the same story: for example, there is no mention of Susan's mother's preferred suitor, and the pair do not marry until after they return to Plymouth. *Black Ey'd Susan's Garland* even gives William a different surname: Lamb.

The epithets 'black-eyed' Susan and 'sweet' William were not new in 1719. Indeed, the latter had already been paired with Susan in the chapbook *The Two Loyal Lovers, Sweet William and Coy Susan* at the end of the previous century.<sup>9</sup> This anonymous poem, to the tune of 'Let Caesar Live Long',<sup>10</sup> has no nautical theme and is simply a discussion between two shy lovers. Although Gay's characters appear to be original, the poem's theme of a nautical farewell is a common one and Gay was arguably simply exploiting a well-established formula.<sup>11</sup>

Later versions of the song, variously known as 'Sweet William's Farewell', 'Black-Ey'd Susan', or 'All in the Downs', remain reasonably faithful to Gay's text. Apart from occasional rearrangement or omission of stanzas, changes mainly comprise the restoration of vowels to apostrophized words, alterations to punctuation and spelling, and correcting mismatched tenses (as in the final line).

### The Tunes

Eleven weeks after Lintot's first publication of Gay's poem, 'the 3d edition' was announced in the *Daily Courant* of 25 March 1719, now with the added note, 'Set to Musick by Mr Leveridge'. Leveridge's tune appeared in *The Musical Miscellany* (1730) (Figure 1).<sup>12</sup> Apart from variations in the accompaniment, this was the form in which Leveridge's setting continued to be published until the 1850s.

148 *THE MUSICAL MISCELLANY.*  
Sweet *WILLIAM's FAREWELL* to  
*Black-ey'd SUSAN.*  
By Mr. *GAY.*  
The Tune by Mr. *LEVERIDGE.*

All in the *Downs* the Fleet was moor'd, The  
Streamers waving in the Wind, When black-ey'd  
*Susan* came aboard. Oh! where shall I my  
true Love find? Tell me, ye jo-vial Sailors,

149 *THE MUSICAL MISCELLANY.* 149  
tell me true, If my sweet *William*, if my sweet  
*William* sails among the Crew.  
*William*, who high upon the Yard  
Rock'd with the Billow to and fro,  
Soon as her well-known Voice he heard,  
He sigh'd, and cast his Eyes below:  
The Cord slides swiftly thro' his glowing Hands,  
And (quick as Light'ning) on the Deck he stands.  
So the sweet Lark, high-pois'd in Air,  
Shuts close his Pinions to his Breast,  
(If, chance, his Mate's Thrill Call he hear)  
And drops at once into her Nest:  
The noblest Captain in the *British* Fleet  
Might envy *William's* Lip those Kisses sweet.

L 3

Figure 1 Leveridge's tune, from *The Musical Miscellany*

Richard Leveridge (1670–1758) was one of London's leading singers. Charles Burney in his *General History of Music* refers to Leveridge's 'deep and powerful base [*sic*] voice'.<sup>13</sup> Leveridge first came to prominence as the leading bass in a number of productions of Purcell's works during 1695, the last year of the composer's life, and he went on to become a leading figure in Italian opera in London in the first decade of the eighteenth century.<sup>14</sup> He sang in many operas and pantomimes, often performing other songs in the intervals and as encores, and held regular benefit concerts for himself. He also wrote many songs for the theatre, and composed music for theatrical productions, including *The Island Princess* (1699) and *Macheth* (1702). From 1714, he worked at the New Theatre in Lincoln's Inn Fields, and also ran his own coffee shop

in Tavistock Street. Around 1719, the finances of the Lincoln's Inn theatre had become precarious and his coffee house and benefit concerts provided Leveridge with an important source of additional financial security.

It is unclear whether Leveridge knew Gay personally in 1719. Gay's biographers make little mention of Leveridge other than in the context of 'Black-Ey'd Susan'.<sup>15</sup> Gay's *Beggar's Opera* was performed at the Lincoln's Inn theatre in 1728, so the two men may well have met by then.<sup>16</sup> It might simply be that Leveridge recognized the potential of Gay's poem and set it to music for one of his performances in early 1719. The London press of the time is frustratingly silent about Leveridge's activities, and I have been unable to identify a specific event at which 'Black-Ey'd Susan' might have been first performed.

Joseph Green observes that Leveridge's tune is similar to 'a Terzetto by Buononcini'.<sup>17</sup> The opening of aria no. 33, 'Se un gran piacere può far morire', of Giovanni Battista Bononcini's serenata *La nemica d'Amore fatta amante* (1692) does indeed have a similar melodic contour to Leveridge's tune (although the metre is different), and the cadence note of the second phrase is also the same (Figure 2).<sup>18</sup>

Countertenor

Organ

Violoncello

5

Se un gran pia - ce - re può far mo - ri - re,

10

il mi-o con - ten - to m'ucci - de - rà

Figure 2 Aria no. 33 from Giovanni Bononcini's *La nemica d'Amore fatta amante*

However, the resemblance does not extend beyond the first few bars. Bononcini's Italian operas were popular in early eighteenth-century London, and Leveridge sang in *Camilla* several times between 1706 and 1717.<sup>19</sup> By 1719, the year Bononcini moved to London as an associate of Handel's (though the two later became arch-rivals), Leveridge would have been familiar with many of his works and he is known to have set words to some of Bononcini's instrumental pieces.

The first few bars of Leveridge's tune also resemble those of 'The Bishop of Bangor's Jig', published by Henry Playford in 1701 (Figure 3).<sup>20</sup> Several editions of the *Daily Courant* from around 1717 record an ongoing controversy involving the then bishop of Bangor, so it is possible that the tune had been resurrected and was popular at the time.



**Figure 3** 'The Bishop of Bangor's Jig', from Henry Playford, *The Dancing-Master*

William Chappell comments that Leveridge's tune is 'very like another which he composed', that 'several other old songs begin in the same manner', and that Leveridge 'seems to have drawn more on memory than imagination'.<sup>21</sup> In fact, there is a large family of tunes with which Leveridge's could reasonably be grouped. Bertrand Bronson cites a number of examples, several of which share the melodic contour of Leveridge's 'Black-Ey'd Susan', and speculates that it might be possible to use objective analysis of such families of tunes to trace their evolution over time.<sup>22</sup> Although it is unclear which song Chappell considered to be 'very like' 'Black-Ey'd Susan', a few of the forty-two examples included in Leveridge's own *A Collection of Songs* (1727), which, rather surprisingly, does not include 'Black-Ey'd Susan', are stylistically reminiscent of it, with predominantly stepwise minor mode melodies in regular quavers, and a Phrygian cadence ending an opening eight-bar phrase.<sup>23</sup> The borrowing and recycling of musical ideas was, of course, not uncommon in the eighteenth century,<sup>24</sup> and Leveridge seems to have drawn on established formulas for his inspiration.

Leveridge was not alone in setting Gay's poem to music. A printed music sheet of c.1720 in the British Library includes four engraved settings of 'Black-Ey'd Susan', by Henry Carey, Richard Leveridge, George Hayden, and Pietro Sandoni.<sup>25</sup> Henry Carey (1687–1743) was a poet, songwriter, and occasional singer, who was active in the London theatre world around 1720. There is little to link him directly with Gay, but they would have moved in the same circles. George Hayden (or Haydon) (d.1722) was organist at St Mary Magdalen, Bermondsey, and composed a handful of cantatas. Little is known about him, and there is no evidence either to link him to Gay or to shed light on the circumstances of his setting of 'Black-Ey'd Susan'. Pietro Giuseppe Sandoni (1685–1748) was a harpsichordist and singer who was working with Handel in London

around 1720. He went on to marry the famous soprano Francesca Cuzzoni. He may well have known Gay, who also worked with Handel around that time (Gay was one of the librettists for Handel's *Acis and Galatea* of c.1718).

In this source, the first three bars of Leveridge's tune represent a variant of those published in 1730 (Figure 1), but otherwise the two versions are the same. The discrepancy may reflect the fact that performance of the song was apparently rather flexible. Some editions, for example, start with the word 'All' as a crotchet anacrusis, and the held note on 'moor'd' may be of two or five beats. The notated score of 'Black-Ey'd Susan' was not, of course, its definitive embodiment as a musical work. This was a song intended for singing, and it was used by Leveridge and others to show off their vocal skills. Such performances would have involved improvised melodic and rhythmic embellishments to the notated tune, as was common practice in much music before 1800, and it is unsurprising that this variety should be reflected in notated versions of the song.

The tunes by Carey, Hayden, and Sandoni, unlike Leveridge's, are all in major keys (Figure 4). These tunes are more closely related to each other than they are to

The tune by Mr Carey

Mr Haydon's tune

Signr. Sandoni's tune  
(trans. from A major)

All in the downs the fleet was moor'd, The stream - ers  
wav - ing in the wind, When black ey'd Su - san  
came a - board. Oh! Where shall I my true love find?

Figure 4 Three versions of 'Black-Ey'd Susan' from c.1720

Leveridge's. They have a similar phrase structure, and many of the most important melodic notes are either the same or else harmonically related. Carey's and Hayden's tunes, in particular, begin in the same way, are quite similar harmonically, and have melodic embellishments in the same places (such as bar 6). Carey's tune has a greater range (a perfect 11th, compared to a major 9th for Hayden's and an octave for Sandoni's), although none matches Leveridge's perfect 12th. There is little evidence to indicate the exact origins or chronology of these versions, but, on the face of it, they appear to be largely independent of Leveridge's setting of 'Black-Ey'd Susan', and they may well derive from one another and/or from a common source. Hayden's setting does not, as far as I can tell, appear in any other source; and Carey's reappeared only rarely.<sup>26</sup>

Sandoni's tune, on the other hand, went on to have a successful, if somewhat schizophrenic, existence. In 1728, Gay published his best-known work, *The Beggar's Opera*. In act 2, scene 13, the aria 'Thus when the swallow, seeking prey' is specified as to the tune of 'All in the Downs', and Sandoni's tune is printed in all editions of the ballad opera. Yet other ballad operas from around this time, such as Charles Johnson's *The Village Opera* (1729), also have arias sung to the tune of 'All in the Downs', but print Leveridge's tune. Sandoni's tune is included in a bound volume in the British Library, once owned by Charles Burney, that includes the following handwritten introduction: 'This volume contains most of the original songs and beautiful airs which were selected by Pepusch, Arne & Linley for "The Beggars Opera", "Love in a Village" and "Deceived".'<sup>27</sup> The volume also contains Leveridge's tune for the song, and it therefore looks as if Leveridge's tune was consciously rejected for the ballad opera in favour of Sandoni's. Sandoni may have been known to the team assembling *The Beggar's Opera*, and his tune may have achieved a degree of popularity to rival Leveridge's. Given his musical career, he would certainly have had the opportunity to have his version performed in public. After 1728, Sandoni's melody lived on in *The Beggar's Opera*, under the title 'All in the Downs', even though neither tune nor words were related to Leveridge's established version of the song.

There is one further setting of 'Black-Ey'd Susan' from around this period to be considered here. The British Library holds a small, and probably unique, volume of keyboard music by Alexander Stuart to accompany Allan Ramsay's *Tea-Table Miscellany*, which first appeared in 1724.<sup>28</sup> In the *Tea-Table Miscellany*, the song 'To DELIA on her drawing him to her Valantine' is given as 'To the Tune of Black Ey'd Susan'.<sup>29</sup> Alexander Stuart's volume accordingly prints a tune – but it does not appear to be related to the other settings of 'Black-Ey'd Susan' discussed above, and its harmonic progressions rule it out as a keyboard accompaniment to any of them (Figure 5). Nor does it sit comfortably with Gay's words, although (without the repeats, and rewriting it in a 3/4 time signature) it is the same length as Carey's and Sandoni's tunes. Stuart might conceivably have been unfamiliar with 'Black-Ey'd Susan' and have simply transcribed the wrong tune, but I have been unable to confirm this hypothesis by finding the same tune elsewhere under another name.



**Figure 5** 'Black-Ey'd Susan', by Alexander Stuart (transposed from the original in B flat major)

### Developments from 1730

By about 1730, Leveridge's tune had become established as the natural partner of Gay's poem. Carey's, Hayden's, and Stuart's versions were consigned to the archives, while Sandoni's setting was living on, in disguise, in *The Beggar's Opera*. Leveridge's melody probably triumphed for two main reasons: as a tune, it offered the best combination of memorability and singability; and, with London's leading bass performing it regularly, it would have been the version most frequently heard by audiences and musicians.

The tune was requisitioned for a number of ballad operas and other songs during the decades following its publication. Thus Maurice Greene, for example, appropriated Leveridge's tune, with minor modifications but without acknowledgement, for the song 'Fair Sally', which has a similar nautical theme, in 1735. Although Joseph Green argued that Leveridge stole the tune from Greene,<sup>30</sup> that is unlikely since Greene would have been only twenty-three in 1719 (he was organist at St Paul's Cathedral) and he seems to have published nothing before he became Master of the King's Music in the mid-1730s. Greene also had form: he had been an accomplice in the act of plagiarism that led to the exile from England of his friend Giovanni Bononcini in 1731.<sup>31</sup>

The British navy had seen little action since 1717, but increasing tension and subsequent war with Spain from 1739 sparked a resurgence of interest in the nautical theme. In this context, the story of William and Susan captured the imagination of artists. Among the earliest pictorial representations was a painting by Peter Monamy (1681–1749), created for the reopening of Vauxhall Gardens in 1736. The original is now believed lost, but an engraving of 1743 by Pierre Fourdrinier shows Susan being rowed towards a ship in front of a large fleet gathered off Dover, standing in the prow with her arm outstretched; beneath the picture are reproduced stanzas 4 and 8 of Gay's poem.<sup>32</sup>

Such was the impact of 'Black-Ey'd Susan' that Gay and Leveridge have been credited with 'the creation [. . .] of the Jolly Jack Tar and sensitive maiden stereotypes of nautical

song and melodrama' which lasted well into the nineteenth century.<sup>33</sup> Dickens uses the stereotype explicitly in *Dombey and Son*, where the seaman hero Walter Gay and 'Florence Dombey's companion, "Black-Eyed Susan" Nipper, would have reminded many a Victorian reader of the most popular nautical song of the time, John Gay's "Sweet William's Farewell to Black-Ey'd Susan", and of Douglas Jerrold's enormously influential nautical melodrama based on the song'.<sup>34</sup>

Jerrold was a friend of Dickens's, and his melodrama *Black-Ey'd Susan* (1829) became hugely popular during the nineteenth century in both Britain and the United States. Despite its nautical theme, the plot has little connection with Gay's song. Indeed, Jerrold admits in his preface to the first edition that 'As to the title "Black-Ey'd Susan", the writer trusts he may be pardoned for having compelled Gay to become sponsor to the present drama; well aware that as far as any pertinence that may exist between the ballad and the piece, the latter might, with equal justice, have been called "Blue-Ey'd Kate"'.<sup>35</sup>

Alongside these forays into painting, literature, and the theatre, 'Black-Ey'd Susan' continued to develop musically. In the twenty years following 1770, at least four new settings of Gay's poem appeared: by William Jackson (1770), Robert Broderip (1785 and 1789), and Richard Stevens (1785).<sup>36</sup> All are in a 'recitative and aria' style, rather than the strophic settings of earlier in the century.

The 1789 setting by Robert Broderip (c.1758–1808), an organist in Bristol in the 1780s, whose brother Francis was a partner in the Longman and Broderip publishing firm which published Robert's cantata, is entitled *Black Ey'd Susan, a favorite cantata, as sung by Mr. Incledon at the subscription concerts in Bristol and Bath*. It differs from his 1785 setting, although they are similar in places. The first three stanzas are followed by the first two lines of stanza 4, then stanza 8, and then the remainder of stanza 4. Stanzas 5 and 7 are printed at the end in block text, although it is unclear how they should be incorporated into this through-composed setting. The mood changes from *con spirito* (stanza 1, lines 1–3) to *andante con espressione, to recitativo* (stanza 2), to *largo ed amoroso* (stanza 4, lines 1–2).

Charles Incledon (1763–1826) moved to Bath in 1785 and sang with the Bath–Bristol theatre company. His local concerts, for which Broderip wrote his settings of 'Black-Ey'd Susan', made Incledon's reputation and he went on to become England's leading stage tenor. The song would have shown off his high tenor voice. Francis Cunningham Woods observed: 'Black-eyed Susan as sung by Mr. Incledon lies so high that the publishers give an alternative reading so as to avoid the top A's which are well-nigh incessant'.<sup>37</sup> Incledon would probably also have known William Jackson's 1770 cantata-style setting of 'Black-Ey'd Susan', since Incledon was a chorister (and occasional soloist) under Jackson at Exeter Cathedral, before joining the navy. Sydney Northcote remarks that 'Incledon [. . .] was a "rough diamond", uncommonly good in sea songs [. . .] but very self-opinionated'.<sup>38</sup> Incledon also sang the settings of 'Black-Ey'd Susan' by Leveridge and Carey, which were republished in 1800. The former is described on the title page as 'sung by Mr Incledon with uncommon applause'.

Throughout the eighteenth century and into the nineteenth, 'Black-Ey'd Susan' was regularly published as a broadside, and Leveridge's setting appeared in numerous

collections of popular songs. In 1868, the *London* magazine described 'Black-Ey'd Susan' as 'still a favourite' among street singers.<sup>39</sup> Around the middle of the nineteenth century came three significant developments. Firstly, Albert Emerick recognized that, by 1848, 'Black-Ey'd Susan' had been appropriated as 'emphatically [a song] for the American people'.<sup>40</sup> Emerick acknowledged that he had selected 'from the music of all nations the most beautiful, simple and popular airs', but his was just one of several North American collections linking the song to the east coast. 'Black-Ey'd Susan' was probably taken across the Atlantic by British sailors and settlers, and over time it became established as a 'traditional' North American song.

Secondly, in 1849, 'Black-Ey'd Susan' joined the fashionable world of the virtuoso pianist. Alexander Dreyschock (1818–69) was a Czech virtuoso whose party piece was to play the left-hand arpeggios of Chopin's Revolutionary *Étude* (Op. 10, no. 12) in octaves. Dreyschock's mazurka on 'Black-Ey'd Susan', after an opening *entrada*, consists of several increasingly virtuosic variations on Leveridge's melody, with plenty of leaps, hand-crossings, and rapid left-hand octaves.<sup>41</sup> Dreyschock visited London in 1843 and 1849, and the mazurka was perhaps written for the second of these visits. Unfortunately, the piece is not mentioned in any of the enthusiastic concert reviews in *The Times*, although on 25 April 1843 the newspaper announced Dreyschock's first arrival in London, calling him 'one of the most original players that has ever appeared [. . .] with execution equal to that of Thalberg or Liszt'.<sup>42</sup>

The third development was a transformation of Leveridge's tune. William Chappell in *Popular Music of the Olden Time* gives a brief history and then reproduces the song 'as it is now sung' (Figure 6).<sup>43</sup> The shape of the melody is largely the same, but the note lengths have been halved within the same 3/4 time signature, and Leveridge's regular beats have been replaced, at least in the first half of the tune, with alternating dotted crotchets and groups of three quavers, over a clear 3/4 accompaniment. This is a significant change in the pattern of stressed words and notes compared with Leveridge's version. The harmony is also slightly different (partly because of the changed stress patterns): Chappell holds tonic harmony up to the word 'moor'd', for example. I have not found an earlier publication of this version than Chappell's, but it is impossible to say for how long the tune had been performed in this way. There were certainly different interpretations of the tune, and one might reasonably doubt whether the notated steady crotchets had ever accurately represented a melody intended as a showpiece for a singer such as Leveridge. Chappell's version might represent the way the song had always been performed, or it might reflect the recent practice of singers such as Charles Incledon, John Braham, or Miss Hobbs.<sup>44</sup> In any case, Chappell's version is found in most subsequent collections.

Concert advertisements and reviews in *The Times* reveal that 'Black-Ey'd Susan' continued to be performed regularly, and enthusiastically received by audiences and critics, well into the twentieth century. *The Times* broadcast listings also frequently include the song until the late 1920s. This continued popularity (reinforced by the success of Jerrold's play) seems to have turned 'Black-Ey'd Susan' into something of a 'national treasure'.



Figure 6 'Black-Ey'd Susan', from William Chappell, *Popular Music of the Olden Time*

It is no surprise, then, that 'Black-Ey'd Susan' should have been selected for inclusion in the *Daily Express Community Song Book*. It had recently appeared as the first song in Harold Scott's *English Song Book* (1925), perhaps an obvious source for the *Daily Express* compilers.<sup>45</sup> Community singing was not a new phenomenon, but in 1925 it became established as a 'movement'. Dave Russell describes how the Community Singers' Association was established to spread 'the practice of community singing in clubs, factories and social organisations in cities, towns and villages throughout the Empire'.<sup>46</sup> After several successful and well-attended events, the *Daily Express* saw the advantages of being associated with the movement and adopted it wholeheartedly, making extravagant claims for its originality and its social benefits. The *Daily Express Community Song Book* contained over two hundred songs, although the repertoire at community singing events was rather smaller, consisting of a handful of hymns, songs

from the Great War, sea shanties, and a few others. The movement had declined, and the *Daily Express* had lost interest in it, by the end of 1927. Nevertheless, the practice of community singing continued, as evidenced by regular announcements in *The Times* until the late 1940s. Many of these events were broadcast by the BBC. The *Daily Express* continued to sponsor community singing at the FA Cup Final until 1971. 'Black-Ey'd Susan' was not one of the songs regularly performed in community singing, however. It had always been a soloist's showpiece and was not necessarily suitable for singing by a large crowd. It would have been much less familiar than, for example, 'All through the Night', 'Loch Lomond', 'Keep the Home Fires Burning', or 'Abide with Me', and less evocative of 'Merrie England', the theme that linked much of the community repertoire.

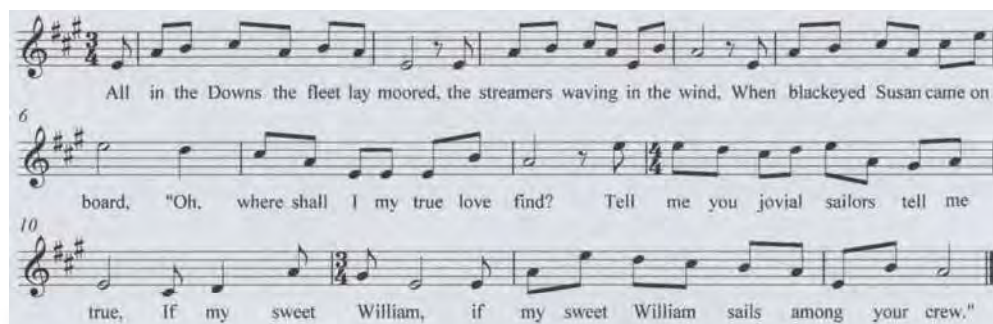
By this time, 'Black-Ey'd Susan' was well on its way to becoming a folk song. In fact, the transition had already begun by the middle of the nineteenth century. 'Black-Ey'd Susan' was collected as an Irish folk tune, based on Leveridge's melody, by George Petrie, although he did not include it in his *Ancient Music of Ireland* (1855), and it was only published in 1905 when his collected papers were edited by Charles Villiers Stanford.<sup>47</sup> In October 1908, Cecil Sharp collected 'Black-Ey'd Susan' from Walter Wilcock in the Marylebone Workhouse (Figure 7).<sup>48</sup> Although the melodic shape is close to the tune published by Chappell (Figure 6), the rhythm is altered in places, apparently to enable Wilcock to fit in his alternative version of some of the words. Note that, in the final line, he asks if 'my Sweet Susan' sails among the crew!

The song was collected a number of times and included in several folk song collections, on both sides of the Atlantic, during the twentieth century, and today it is categorized as 'folk' in a majority of recordings and online resources. On 3 August 1978,



**Figure 7** 'Black-Ey'd Susan', sung by Walter Wilcock (transcribed by Cecil Sharp)

Image reproduced by kind permission of the Master, Fellows, and Scholars of Clare College, Cambridge



**Figure 8** 'Black-Ey'd Susan', sung by Walter Pardon (transcribed by Mike Yates)

it was collected from Walter Pardon of Knapton, Norfolk (Figure 8).<sup>49</sup> Walter Pardon is accurate with Gay's words and the shape of his tune is clearly based on Leveridge's, albeit in the major mode, and sticking to tonic harmony except for the perfect cadences at the end of phrases. The tune is in regular quavers in 3/4, resulting in different accents from those in Leveridge's setting. Nevertheless, these regular quavers are more reminiscent of Leveridge's regular crotchets than of Chappell's rhythmically altered version, suggesting that the heritage of Pardon's 'Black-Ey'd Susan', unlike that of Walter Wilcock, might predate the modification of the standard tune in the mid-nineteenth century.

'Black-Ey'd Susan' continues to be played, and occasionally collected, as a folk tune in Britain and North America. After the *Daily Express Community Song Book*, it appeared in a handful of collections, but new appearances have become increasingly rare.<sup>50</sup>

### The Secrets of Susan's Longevity

'Black-Ey'd Susan' is a survivor. Although, like most songs of the period, there is no manuscript source, we can be reasonably confident about her parentage and her birth early in 1719. Her continued presence and popularity are evidenced by regular publication, but it is through the performances now largely muted by history that she asserted her identity, created her brand, and carved out her role through almost three hundred years of social and musical change. The British Library and other collections contain huge numbers of British songs from the early eighteenth century, the vast majority of which quickly faded into obscurity. The same is true of the popular songs of any age, and it is interesting to speculate on the factors that might have contributed to the unusual longevity of 'Black-Ey'd Susan'.

Firstly, there is quality. This is, of course, highly subjective, but both the words and the tune of 'Black-Ey'd Susan' are simple, yet well constructed, and result in a song that is interesting, performable, and memorable, with appeal for both performers and listeners. Gay's 'literary artfulness' applied to the popular street ballad format made the poem, and thus the song, stand out from the crowd.

Secondly, and more objectively, 'Black-Ey'd Susan' benefited from both Gay and Leveridge being already well-known and popular figures, with an established audience for their work. Gay, in particular, became more celebrated following the success of *The Beggars Opera*. Leveridge was able to give the song plenty of exposure, so that many

people would have quickly had the opportunity to hear it and become familiar with it. The same could perhaps be said of Sandoni's version, but not of those of Carey or Hayden.

The third factor, important for sustaining the song's popularity, is its cultural resonance. It formed part of an established tradition of sailor's farewell songs, which tapped into the importance of seamen to the growth and prosperity of Britain and its empire. This tradition extended well into the twentieth century and must have helped sustain the song's cultural relevance. Leveridge's melody, partly rooted in traditional English folk tunes, also contributes to the song's cultural resonance. 'Black-Ey'd Susan' was particularly fortunate in receiving an extra boost from the popularity of Jerrold's play, as well as paintings and literary references, which both exploited and reinforced the song's nautical associations.

Finally, the flexibility of the song enabled it to move with the times and to gain exposure in different settings and new arrangements. This was partly due to its loose ontological definition, and the fact that nobody seems to have claimed ownership of it as a piece of intellectual property. It was also partly the result of the quality of Gay's verse and of Leveridge's melody, which enabled 'Black-Ey'd Susan' to appear in many different contexts: for example, as a street ballad, a vocal showpiece, a community song, the basis for a virtuoso piano work, and as a folk song appropriated by communities on both sides of the Atlantic. It proved able to maintain its identity despite changes of words, melody, context, and performance practice.

Whilst 'Black-Ey'd Susan' is not alone, the group of songs fortunate enough to satisfy all of these criteria is small. Every stage in the life of a song presents an opportunity either to survive or to fade away. Libraries, record collections, and the internet are littered with the dormant remains of songs that will never again see the light of day. In this context, it is extraordinary that 'Black-Ey'd Susan' continues to have a small but active existence in the crowded digital music marketplace of the early twenty-first century – almost three centuries after she was born into the bustling and cut-throat musical world of early Georgian London.

## Notes

- <sup>1</sup> John Goss, ed., *Daily Express Community Song Book* (London: Daily Express, 1927).
- <sup>2</sup> John Gay, *Poems on Several Occasions*, 2 vols (London: Jacob Tonson and Bernard Lintot, 1720). 'Black-Ey'd Susan' appears in vol. 2, p. 405.
- <sup>3</sup> Alexander Pope, *Mr. Pope's Literary Correspondence*, vol. 3, 2nd edn (London: E Curll, 1735), p. 104.
- <sup>4</sup> Dianne Dugaw, *Deep Play: John Gay and the Invention of Modernity* (Newark, DE: University of Delaware Press, 2001), pp. 86–88.
- <sup>5</sup> Andrew Kuntz, *The Fiddler's Companion* <[www.ibiblio.org/fiddlers/SW\\_SY](http://www.ibiblio.org/fiddlers/SW_SY)> [accessed 5 February 2012].
- <sup>6</sup> *Sweet William of Plymouth* (London: William Dacey, [1735?]) [ESTC N22081]. Some of the later chapbooks make explicit reference to William Whitcraft (or Whitecraft) and Susan Cole. See, for example, *The Western Garland* ([Newcastle upon Tyne?, 1775?]) [ESTC T52340].
- <sup>7</sup> Despite searching books and periodicals from the late seventeenth and early eighteenth centuries, consulting genealogical records, and seeking help from the Plymouth and West Devon Records Office, I have been unable to confirm whether or not, and if so when, William Whitcraft and Susan Cole were alive, and whether these events did actually take place.
- <sup>8</sup> See, for example *William and Susan's Garland* (Warrington: Eyres, [1760?]) [ESTC T182469]; *Black Ey'd Susan's Garland* (Hull: [John Ferraby, 1790?]) [ESTC T22869]; *Black-Ey'd Susan's Garland* (Edinburgh [sic]: J Morren, [1800?]) [ESTC N32819].
- <sup>9</sup> *The Two Loyal Lovers, Sweet William and Coy Susan* ([London]: J. Blare, [1685?]) [ESTC R228626].
- <sup>10</sup> 'Let Caesar Live Long' appears to be unrelated to any of the 'Black-Ey'd Susan' tunes discussed here. See Claude M. Simpson, *The British Broadside Ballad and its Music* (New Brunswick, NJ: Rutgers University Press, 1966), pp. 434–37.
- <sup>11</sup> The Pepys Ballads, comprising around 1,800 ballads dating mainly from the century before 'Black-Ey'd Susan', include 110 with 'farewell' in the title and 133 marked with the keyword 'maritime' in the English Broadside Ballad Archive (EBBA); thirteen fall into both categories <[ebba.english.ucsb.edu/](http://ebba.english.ucsb.edu/)>.
- <sup>12</sup> *The Musical Miscellany*, 6 vols (London: John Watts, 1729–31), iv, 148–51 [ESTC T118842].
- <sup>13</sup> Charles Burney, *A General History of Music, from the Earliest Ages to the Present Period*, ed. Frank Mercer, 2 vols (New York: Dover, 1935 [1789]), ii, 667.
- <sup>14</sup> Olive Baldwin and Thelma Wilson, 'Richard Leveridge, 1670–1758', *Musical Times*, 111 (1970), 592–94, 891–93, 988–90; Olive Baldwin and Thelma Wilson, 'Leveridge, Richard (1670–1758)', *Oxford Dictionary of National Biography*, online edn (January 2008) <[www.oxforddnb.com/view/article/16536](http://www.oxforddnb.com/view/article/16536)> [accessed 8 March 2013].
- <sup>15</sup> See, for example, William H. Irving, *John Gay, Favorite of the Wits* (New York: Russell & Russell, 1962).
- <sup>16</sup> Mary F. Klinger, 'Music and Theater in Hogarth', *Musical Quarterly*, 57 (1971), 409–26 (p. 414).
- <sup>17</sup> Joseph Green, reply to W. J. Löwenberg, 'The Celtic Element in English Music', *Musical Times and Singing Class Circular*, 19 (1 March 1878), 163.
- <sup>18</sup> The title of Bononcini's serenata translates as 'The enemy of Love has become a lover'; aria no. 33 begins 'If a great pleasure can cause death, my happiness will kill me'. The libretto is by Silvio Stampiglia. The transcription is from Ensemble 415, *La nemica d'Amore fatta amante*, by Giovanni Bononcini, CD (Zig-Zag Territoires ZT030801, 2005) (author's transcription).
- <sup>19</sup> Robert D. Hume, 'The Sponsorship of Opera in London, 1704–1720', *Modern Philology*, 85 (1988), 420–32.
- <sup>20</sup> Henry Playford, *The Dancing-Master*, 11th edn (London: H. Playford, 1701), p. 200.
- <sup>21</sup> William Chappell, *Popular Music of the Olden Time*, 2 vols (London: Chappell, 1859), ii, 640.
- <sup>22</sup> Bertrand Harris Bronson, 'Some Observations about Melodic Variation in British-American Folk Tunes', *Journal of the American Musicological Society*, 3 (1950), 120–34.
- <sup>23</sup> [Richard Leveridge], *A Collection of Songs, with the musick by Mr Leveridge*, 2 vols (London, 1727).
- <sup>24</sup> See, for example, J. Peter Burkholder, 'Borrowing', *Grove Music Online*, Oxford Music Online <[www.oxfordmusiconline.com/subscriber/article/grove/music/52918](http://www.oxfordmusiconline.com/subscriber/article/grove/music/52918)> [accessed 8 March 2013].
- <sup>25</sup> *Sweet William's Farewell to Black-Ey'd Susan*. The Tune by Mr. Carey. Mr. Leveridge's Tune. Mr. Haydon's Tune. Signr. Sandoni's Tune. ([London, 1720]) [London, British Library, H.1601.(24.)].
- <sup>26</sup> It is included in *The Works of Mr Henry Carey*, 2 vols (London, 1728), i, 37. It is also found later in *All in the Downs the Fleet Was Moored: Black Ey'd Susan, a favorite sea song, as sung by Mr Incedon*

- (London: A. Bland & Weller's Music Warehouse, [c.1800]).
- <sup>27</sup> The volume in question is London, British Library, G.305. Sandoni's 'All in the Downs', catalogued as G.305.(176.), is found at p. 209.
- <sup>28</sup> [Alexander Stuart], *Musick for Allan Ramsay's Collection of Scots Songs* (Edinburgh: Allan Ramsay, [1725?]).
- <sup>29</sup> [Allan Ramsay], *The Tea-Table Miscellany* (Edinburgh: Thomas Ruddiman, 1724), pp. 19–20 [ESTC N45927].
- <sup>30</sup> See n. 17 above.
- <sup>31</sup> Harry Diack Johnstone, 'Greene, Maurice', *Grove Music Online*, Oxford Music Online <www.oxfordmusiconline.com/subscriber/article/grove/music/11707> [accessed 8 March 2013].
- <sup>32</sup> Fourdrinier's engraving is reproduced at <www.cichw1.net/pmsusan.html> [accessed 13 March 2013].
- <sup>33</sup> William Axton, 'Dombey and Son: From Stereotype to Archetype', *English Literary History*, 31 (1964), 301–17 (p. 310), citing Maurice Willson Disher, *Victorian Song: From Dive to Drawing Room* (London: Phoenix House, 1955), p. 48.
- <sup>34</sup> Axton, 'Dombey and Son', p. 310.
- <sup>35</sup> Douglas W. Jerrold, *Black-Ey'd Susan, A Drama, dedicated to the Duke of Clarence* (London: Thomas Richardson, 1829), p. viii.
- <sup>36</sup> *Twelve Songs set to music by William Jackson of Exeter*, Opera settima (London: printed for the author, [1770?]), pp. 8–12; Robert Broderip, *Sweet William's Farewell to Black Ey'd Susan, a favorite cantata* (London: Longman and Broderip, [1785?]); Robert Broderip, *Black Ey'd Susan, a favorite cantata, as sung by Mr. Incledon* (London: Longman and Broderip, [1789]); Richard J. S. Stevens, *All in the Downs, a favorite song, by Mr. Gay* [...] *sung by Mr. Percy* (London: S., A., & P. Thompson, [1785?]).
- <sup>37</sup> Francis Cunningham Woods, 'A Consideration of the Various Types of Songs Popular in England during the Eighteenth Century', *Proceedings of the Musical Association*, 23 (1897), 37–55 (p. 47).
- <sup>38</sup> Sydney Northcote, *Byrd to Britten: A Survey of English Song* (London: Baker, 1966), p. 74.
- <sup>39</sup> 'Street Songs and their Singers', *The London: A First-Class Magazine*, 3 (1868), 226–38 (p. 232).
- <sup>40</sup> Albert G. Emerick, *Songs for the People* (Philadelphia: [n. pub.], 1848), p. 7.
- <sup>41</sup> Alexander Dreyschock, *Mazurka sur la mélodie 'Black Eyed Susan', pour le piano forte*, Op. 65 (London: Robert Cocks, 1849).
- <sup>42</sup> *The Times*, 25 April 1843, p. 5.
- <sup>43</sup> Chappell, *Popular Music of the Olden Time*, II, 640.
- <sup>44</sup> *The Times*, 23 September 1836, p. 3, reporting on the Norwich Festival, noted that Miss Hobbs sang 'Black-Ey'd Susan' 'with great pathos and sweetness'. *The Times*, 20 October 1843, p. 2, advertised John Braham's performance at the Queen's Concert Rooms, Hanover Square, and *The Times*, 27 October 1843, p. 3, gave the concert a positive review.
- <sup>45</sup> H. Scott, ed., *English Song Book* (London: Chapman & Hall, 1925).
- <sup>46</sup> Dave Russell, 'Abiding Memories: The Community Singing Movement and English Social Life in the 1920s', *Popular Music*, 27 (2008), 117–33 (p. 119), quoting from *The Times*, 9 May 1925.
- <sup>47</sup> Charles Villiers Stanford, ed., *The Complete Collection of Irish Music as noted by George Petrie*, 3 parts (London: Boosey, 1902–05), pt II, p. 183 (no. 729).
- <sup>48</sup> Cambridge, Clare College Archives, CCP/SHA, Cecil Sharp Collection of Folk Song Manuscripts, Folk Tunes 1959.
- <sup>49</sup> Transcribed from Mike Yates, 'The Ballad of "Black-Eyed Susan" (Laws O28)', *English Dance & Song*, 42.1 (1980), 5–6. There is a recording on Walter Pardon, *Put a Bit of Powder on It, Father*, 2 CDs (Musical Traditions CD 305–6, 2000), CD 1, track 10.
- <sup>50</sup> Sheet music website <www.musicroom.com> currently stocks just two items containing the song, a collection of American folk songs and one of slow Irish airs [accessed 20 July 2012]. Music download site iTunes lists many tracks entitled 'Black-Eyed Susan', but most of these are unrelated [accessed 20 July 2012]. Just three are the Gay–Leveridge original, all in the Chappell version: Shirley Collins, *The Power of the True Love Knot* (Fledg'ling Records FLED 3028, 2000 [1968]), track 6; Ian King, *Panic Grass and Fever Few* (Fledg'ling Records FLED 3082, 2009), track 3; and Redhill Rats, *Some Heroes* (CD Baby 634479854637, 2008), track 3. In addition, William Topley, *All in the Downs* (CD Baby 00941393, 1997), track 10, a song called 'Sweet William', is – true to tradition – Gay's poem set to a different tune.

# The King Shall Come 101

## MORNING SONG

1. The King shall come when morn-ing dawns and light tri-um-phant breaks,  
 2. Not as of old a lit-tle child to bear, and fight, and die,  
 3. O bright-er than the ris-ing morn when He, vic-to-rious, rose  
 4. O bright-er than that glo-rious morn shall this fair morn-ing be,

when beau-ty gilds the east-ern hills, and life to joy a-wakes.  
 but crowned with glo-ry like the sun that lights the morn-ing sky.  
 and left the lone-some place of death, de-spite the rage of foes.  
 when Christ, our King, in beau-ty comes, and we His face shall see.

5. The King shall come when morning dawns,  
 and earth's dark night is past;  
 O haste the rising of that morn,  
 the day that aye shall last.
7. The King shall come when morning dawns,  
 and light and beauty brings;  
 "Hail, Christ the Lord!" Thy people pray,  
 come quickly, King of kings!
6. And let the endless bliss begin,  
 by weary saints foretold,  
 when right shall triumph over wrong,  
 and truth shall be extolled.

WORDS: Ancient Greek hymn; tr. John Brownlie, 1907

CM

MUSIC: Traditional American melody; *Kentucky Harmony*, 1813

## Malachi 3:1-2 102

Behold, I send My messenger,  
 and He will prepare the way before Me.  
**And the Lord whom you seek will suddenly come to His temple;**  
**and the messenger of the covenant in whom you delight,**  
 behold, He is coming, says the LORD of hosts.  
**But who can endure the day of His coming,**  
**and who can stand when He appears?**

H397  
Farewell, lovely Nancy, we must leave you

The image shows a handwritten musical score on aged paper. The title 'Farewell, lovely Nancy, we must leave you' is written in cursive above the first staff. The number 'H397' is written above the second staff. The music is written on three staves in treble clef, with a key signature of one flat (B-flat). The first staff contains a melody of eighth and sixteenth notes. The second staff continues the melody. The third staff begins with a bass line and ends with a double bar line. A large, stylized 'X' is drawn over the right side of the page, partially obscuring the music and the 'efdss' logo.

efdss  
english folk dance and song society

COMFORT, DEATH, AND GLORY

## If Thou but Trust in God to Guide Thee 323

NEUMARK

1. If thou but trust in God to guide thee and hope in  
 2. What can these anx - ious cares a - vail thee, these nev - er -  
 3. On - ly be still, and wait His lei - sure in cheer - ful  
 4. All are a - like be - fore the High - est; 'tis eas - y  
 5. Sing, pray, and keep His ways un - swerv - ing; in all thy

Him through all thy ways, He'll give thee strength, what - e'er be -  
 ceas - ing moans and sighs? What can it help if thou be -  
 hope, with heart con - tent to take what - e'er thy Fa - ther's  
 to our God, we know, to raise thee up though low thou  
 la - bor faith - ful be, and trust His Word; though un - de -

tide thee, and bear thee through the e - vil days; who trusts in  
 wail thee o'er each dark mo - ment as it flies? Our cross and  
 pleas - ure and all - dis - cern - ing love have sent; nor doubt our  
 li - est, to make the rich man poor and low; true won - ders  
 serv - ing, thou yet shalt find it true for thee. God nev - er

God's un - chang - ing love builds on the Rock that naught can move.  
 tri - als do but press the heav - ier for our bit - ter - ness.  
 in - most wants are known to Him who chose us for His own.  
 still by Him are wrought who set - teth up and brings to naught.  
 will for - sake in need the soul that trusts in Him in - deed.

WORDS: Georg Neumark, 1641; tr. Catherine Winkworth, 1863, alt.

9.8.9.8.8.8

MUSIC: Georg Neumark, 1641

# O God of Every Nation

William Watkins Reid, Jr., 1958

D. Evans, 1865

♩=113

1. O God of ev - ery na - tion, Of ev - ery race and land, Re-  
 2. From search for wealth and pow - er And scorn of truth and right, From  
 3. Lord, strength - en those who la - bor That all may find re - lease From  
 4. Keep bright in us the vi - sion Of days when war shall cease, When

- deem the whole cre - a - tion With your al - migh - ty hand, Where hate and fear di-  
 trust in bombs that show - er Des - tract - ion through the night, From pride of race and  
 fear of rat - tling sa - ber, From dread of war's in - crease; When hope and cour - age  
 hat - red and di - vi - sion Give way to love and peace, Till dawns the morn - ing

- vide us And bi - tter threats are hurled, In love and mer - cy guide us And  
 sta - tion And blind - ness to your way, De - li - ver ev - ery na - tion, E-  
 fal - ter, Your still small voice be heard; With faith that none can al - ter, Your  
 glor - ious When truth and jus - tice reign And Christ shall rule vic - tor - ious O'er

- heal our strife - torn world.  
 ter - nal God, we pray.  
 ser - vants un - der - gird.  
 all the world's do - main.

## SUFFERING AND DELIVERANCE

511

## Take Up Your Cross

1. "Take up your cross," the Sav - ior said, "if you would  
2. Take up your cross; let not its weight fill your weak  
3. Take up your cross, heed not the shame, and let your  
4. Take up your cross, then, in Christ's strength, and calm - ly

my dis - ci - ple be; take up your cross with  
spir - it with a - larm; Christ's strength shall bear your  
fool - ish heart be still; the Lord for you ac -  
ev - 'ry dan - ger brave: it guides you to a -

will - ing heart, and hum - bly fol - low af - ter me."  
spir - it up and brace your heart and nerve your arm.  
cept - ed death up - on a cross, on Cal - v'ry's hill.  
bun - dant life and leads to vic - t'ry o'er the grave.

Charles W. Everest, 1814–1877; alt.

ERHALT UNS, HERR 8.8.8.8.  
Joseph Klug, *Geistliche Lieder*, 1543  
Harm. Johann Sebastian Bach, 1685–1750

## General

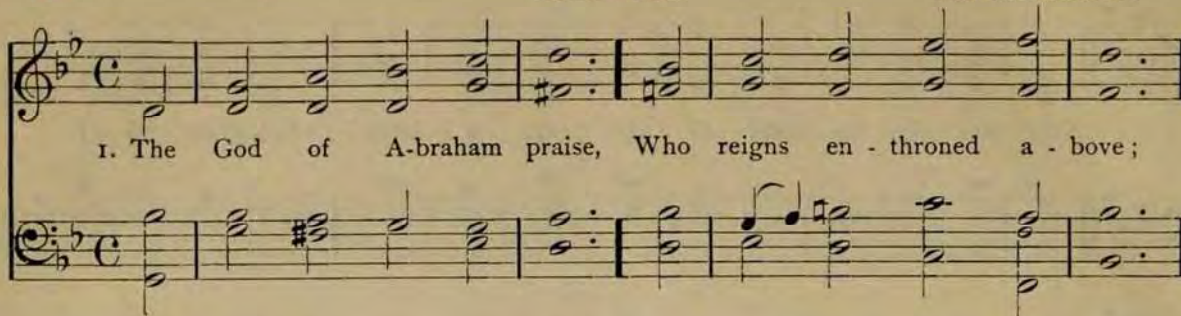
460

## The God of Abraham praise.

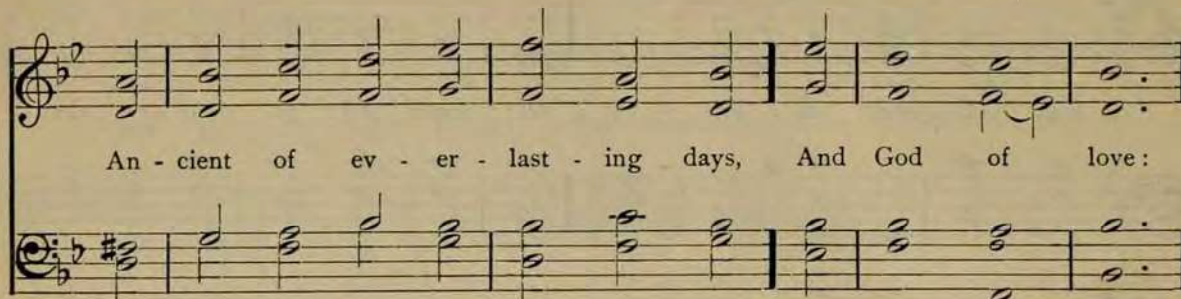
P. M.

FIRST TUNE.

JEWISH MELODY.



1. The God of A-braham praise, Who reigns en - throned a - bove ;



An - cient of ev - er - last - ing days, And God of love :



Je - ho - vah, great I AM, By earth and heaven con - fest ;



I bow and bless the sa - cred Name, For - ev - er blest. A-MEN.

2 He by Himself hath sworn,  
I on His oath depend,  
I shall, on angel-wings upborne,  
To heaven ascend :  
I shall behold His face,  
I shall His power adore,  
And sing the wonders of His grace  
For evermore.

3 There dwells the Lord, our King,  
The Lord, our Righteousness,  
Triumphant o'er the world and sin,  
The Prince of Peace ;  
On Sion's sacred height  
His kingdom He maintains,  
And, glorious with His saints in light,  
Forever reigns.

## The Huron Carol

hymn by  
**St. Jean de Brebeuf**  
translated by  
George Middleton

trad. Huron  
arr. by  
**Michael J. Oczko**

Soprano

*Solo Soprano:* *mf*

'Twas in the moon of win - ter time when all the birds had fled, that

III: 8' Reed

II: 8' Prin. *p*

*p*

*p*

S

*rit.*

Might-y Git-chi Man-i-tou sent an-gel choirs in-stead. Be - fore their light the stars grew dim and wand'ring hun-ters heard the hymn—

Org.

*rit.*

S

*a tempo* *f* *Tutti: mp* *mf* *f*

Je - sus your King is born, Je - sus is born, Glo - - - - ri-a in ex - cel-sis Glo-ri - a

A

*a tempo* *mp* *mf* *f*

Glo - - - - ri-a in ex - cel-sis Glo-ri - a

Org.

*a tempo* *pp* *mp*

*a tempo* *pp* *mp*

*a tempo* *pp* *mp*

2  
75

*mf*

S With - in a lodge of bro - ken bark the ten - der babe was found a rag - ged robe of rab - bit skin en -

*mp*

A Ah, - ah - ah - ah - ah - ah - ah - ah - Ah, - ah, - ah, - ah, -

*p*

T Oo - - - - - Oo - - -

*p*

B Oo - - - - - Oo - - -

15

Org.

19

*a tempo*

*rit.*

*f*

S wrapped His beau - ty round, But as the hun - ter braves drew nigh the an - gel song rang loud and high: Je - sus your King is born,

*mf*

*rit.*

*f*

A - - ah, - ah, - ah, - But as the hun - ter braves drew nigh the an - gel song rang loud and high: Je - sus your King is born,

*mf*

*rit.*

*f*

T - - - - - But as the hun - ter braves drew nigh the an - gel song rang loud and high: Je - sus your King is born,

*mf*

*rit.*

*f*

B - - - - - But as the hun - ter braves drew nigh the an - gel song rang loud and high: Je - sus your King is born,

23

S Je - sus is born, in ex - cel - sis Glo - ri - a! Oo - - - 3

A Je - sus is born, in ex - cel - sis Glo - ri - a! Ah, - ah, - ah, - ah, -

T Je - sus is born, in ex - cel - sis Glo - ri - a! The earl - iest moon of win - ter - time is

B Je - sus is born, in ex - cel - sis Glo - ri - a! Oo - - -

Org.

28

S Oo - - - The chiefs from far be - fore Him knelt with

A ah, - ah, - ah, - ah, - Ah, - ah, - ah, - ah, - ah, - ah, - The chiefs from far be - fore Him knelt with

T not so round and fair as was the ring of glo - ry on the help - less In - fant there, The chiefs from far be - fore Him knelt with

B Oo - - - The chiefs from far be - fore Him knelt with

Org.

4  
32

*rit.* *f* *a tempo*

S gifts of fox and bea-ver pelt— Je-sus your King is born, Je-sus is born, in ex-cel-sis Glo-ri-a!

*rit.* *f* *a tempo*

A gifts of fox and bea-ver pelt Je-sus your King is born, Je-sus is born, in ex-cel-sis Glo-ri-a!

*rit.* *f* *a tempo*

T gifts of fox and bea-ver pelt— Je-sus your King is born, Je-sus is born, in ex-cel-sis Glo-ri-a!

*rit.* *f* *a tempo*

B gifts of fox and bea-ver pelt Je-sus your King is born, Je-sus is born, in ex-cel-sis Glo-ri-a!

37

*f*

S Oh Child-ren of the fo-rest free, Oh sons of Man-i-tou: The Ho-ly Child of heav'n and earth is

*f*

A Oh Child-ren of the fo rest free, Oh sons of Man-i-tou: The Ho-ly Child of heav'n and earth is

*f*

T Oh Child-ren of the fo-rest free, Oh sons of Man-i-tou: The Ho-ly Child of heav'n and earth is

*f*

B Oh Child-ren of the fo-rest free, Oh sons of Man-i-tou: The Ho-ly child of heav'n and earth is

I: Prin.8',4' + Mixt.

37

*f* + Reeds

Org. *f*

*f*

+ Reed 16'

*f*

41

S born this day for you! Come kneel be-fore the rad-iant Boy who brings you beau-ty, peace, and joy,— Je-sus your King is born,

A born this day for you! Come kneel be-fore the rad-iant Boy who brings you beau-ty, peace, and joy,— Je-sus your King is born,

T born this day for you! Come kneel be-fore the rad-iant Boy who brings you beau-ty, peace, and joy,— Je-sus your King is born,

B born this day for you! Come kneel be-fore the rad-iant Boy who brings you beau-ty, peace, and joy,— Je-sus your King is born,

Org.

*rit.* *ff* *a tempo*

*rit.* *ff* *a tempo*

*rit.* *ff* *a tempo*

*rit.* *ff* *a tempo*

*rit.* *a tempo*

*rit.* *a tempo*

*rit.* *a tempo*

45

S Je - sus is born, Glo - - - - ri-a! in ex - cel - sis Glo - ri - a!

A Je - sus is born, Glo - - - - ri-a! in ex - cel - sis Glo - ri - a!

T Je - sus is born, Glo - - - - ri-a! in ex - cel - sis Glo - ri - a!

B Je - sus is born, Glo - - - - ri-a! in ex - cel - sis Glo - ri - a!

Org.

*mf* *ff* *molto rit.*

*mf* *ff* *molto rit.*

*mp* *ff* *molto rit.*

*mp* *ff* *molto rit.*

*p* *ff* *molto rit.*

*p* *ff* *molto rit.*

*p* *ff* *molto rit.*

*p* *ff* *molto rit.*



## Wakefield Jigg: Annotations

## Wakefield Jigg



Book: Walsh

X:1

T:Wakefield Jigg

B:Walsh

M:6/8

L:1/8

K:Gm

d| g2 a bag|^fga dcB|ABc BAG|^F2 G AFD|

g2 a bag|^fga dcB|ABc BAG|G2 ^F G3:|

|:f g2 fed|ode dcB|ABc def|c3 B3|

bag ^f2 g| a3 ABG| b g2 b g2|dg^f g3:|]